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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

JAMES H. GOMEZ, Director
Petitioner,

v.

MITCHELL ALFRED PATTERSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred by extending *Francis v. Franklin*, 471 U.S. 307 (1985) to a case involving proper intent instructions and no instructional link between the instructions on specific intent for first degree murder and the alleged *Sandstrom* error, a single instruction accurately stating pursuant to California statute that Respondent was to be presumed sane at the guilt phase of his trial.

2. Whether this Court should exercise its supervisory power to correct the Ninth Circuit's failure to notify the parties that it had augmented the appellate record with a partial transcript which was then used to support its rationale for reversal despite language in the augmented transcript which indicated that further augmentation would undermine the rationale for reversal.

3. Whether this Court should resolve the conflict between the majority opinions in *Cupp v. Naughten*, 414 U.S. 141 (1973) and *Francis v. Franklin*, 471 U.S. 307 (1985).

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

No. _____

JAMES H. GOMEZ, *Petitioner*,

v.

MITCHELL ALFRED PATTERSON, *Respondent*.

OPINION BELOW[1/]

Petitioner respectfully petitions for a writ of certiorari to review the August 16, 2000, decision of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") in *Patterson v. Gomez*, 223 F.3d 959, (9th Cir. 2000) (No.99-15530) (hereafter "*Patterson*") (Appendix A), which reversed the judgment of the United States District Court for the Eastern District of California that denied Respondent's habeas corpus petition. Respondent is a prisoner in state custody pursuant to a judgment of conviction for first degree murder in the Superior Court of the State of California.

Petitioner has included the following orders and opinions as Appendices: (A) the Ninth Circuit's opinion in *Patterson*; (B) the Ninth Circuit's September 11, 2000, order granting Petitioner's motion for stay of mandate; (C) United States District Court Judge David F. Levi's February 25,

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1. This section contains the citations required by Rule 14(d) of the Rules of the Supreme Court of the United States.

1999, order denying a certificate of appealability on Respondent's claim of insufficient evidence and granting a certificate of appealability on Respondent's claim that due process was violated by the trial court's instruction that defendant was presumed to be sane; (D) United States District Court Judge David F. Levi's December 17, 1998, order adopting the Findings and Recommendations of the magistrate judge in full and denying Respondent's application for writ of habeas corpus; (E) United States Magistrate Judge Gregory G. Hollows' May 22, 1998, Findings and Recommendations that the application for writ of habeas corpus be denied; (F) the California Supreme Court's February 14, 1996, denial of Respondent's petition for review; and (G) the November 6, 1995, opinion of the Court of Appeal of the State of California, Third Appellate District.

Pursuant to Rule 12.7 of the Rules of the Supreme Court of the United States, Petitioner will cite to or quote from the record, even though the record has not been transmitted to the Court.

STATEMENT OF JURISDICTION

The Ninth Circuit entered its judgment on August 16, 2000. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

Because of the length of the relevant constitutional provisions and statutes, their pertinent text is set out in Appendix (H). These authorities include: the Fourteenth Amendment to the United States Constitution; 28 U.S.C. sections 1254(1), 2253(a), 2254(a), 2254(d)(1), 2254(e)(1);

and California Penal Code sections 187, subdivision (a), 1026, subdivision (a), and 1192.7, subdivision (c)(1).

STATEMENT OF THE CASE

On March 31, 1993, Respondent killed his 10-year-old daughter, Adrianna, by carrying her onto Interstate 80 and throwing her into the path of a large semi truck.

On June 3, 1993, an information was filed in Nevada County Superior Court case number 49140, charging Respondent Mitchell Alfred Patterson with a single count of violating California Penal Code section 187, subdivision (a), murder in the first degree.[2/] It was further alleged that the murder was a serious felony within the meaning of section 1192.7, subdivision (c)(1).

On June 23, 1993, Respondent entered pleas of not guilty and not guilty by reason of insanity. Consequently, Respondent's trial was bifurcated into a guilt phase and a sanity phase pursuant to section 1026.

On November 17, 1993, Respondent's trial began. The next day, jury panelists were provided with jury questionnaires and instructed to fill them out and return them to the Clerk.[3/] Jury questionnaire question number 58 asked that the prospective jurors answer yes or no to two specific questions pertinent to the instant petition. Specifically, after informing the prospective jurors in question number 58 that "[i]nsanity, as referred to in this case, is a legal term not a medical term," each prospective juror was asked "Do you agree a person can be mentally ill and under the law not insane?" and "Do you have a problem

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2. All further statutory references are to the California Penal Code unless otherwise indicated.

3. A blank copy of the jury questionnaire filled out by the jurors in this case is attached as Appendix I.

with that aspect of the law?"[4/] (Appendix I at 9-10.) Voir dire commenced on November 18, 1993, and continued through November 19, 1993, when the court instructed the jury as to the nature and procedure of the trial. (Appendix J.) On December 2, 1993, the presentation of evidence began in the guilt phase of Respondent's bifurcated jury trial. On January 27, 1994, at the conclusion of the guilt phase, the jury found Respondent guilty of first degree murder.

In the sanity phase, the first jury deadlocked and the court declared a mistrial. After retrial of the sanity phase, a second jury found Respondent legally sane at the time he committed the crime of murder in the first degree.

On July 29, 1994, the court denied probation and sentenced Respondent to a term of 25 years to life in state prison.

On November 6, 1995, the Court of Appeal of the State of California, Third Appellate District, affirmed Respondent's conviction. (Appendix G.) In so doing, the court found that *Francis v. Franklin*, 471 U.S. 307 (1985) (hereafter "*Francis*") was "inapposite" because the trial court in Respondent's case "expressly instructed the jury it could consider evidence of defendant's mental disability in determining whether he formed 'the mental state or specific intent' necessary for murder." (Appendix G at 9, fn.2.) The Third Appellate District found that it was "undisputed that the trial court correctly advised the jurors (1) that the case would be tried in two parts, a guilt phase and a sanity phase, and (2) that defendant was presumed sane in the guilt phase" and that "trial counsel did not take issue with the challenged instruction." (Appendix G at 10.)

4/ Question number 58 was preceded and followed by a series of questions which included questions concerning the use of circumstantial evidence as a means of proving specific intent or mental state, and questions pertaining to psychiatry, psychology, psychiatric testimony and mental illness. (Appendix I at 7-11.)

On February 14, 1996, the California Supreme Court denied Respondent's petition for review. (Appendix F.)

On August 28, 1996, Respondent filed an application for writ of habeas corpus in the United States District Court, Eastern District of California (Sacramento), raising two grounds for relief: (1) that his due process rights under the Fourteenth Amendment were violated when the trial court instructed the jury during the guilt phase that he was presumed to be sane, thereby relieving the prosecution of the burden of proving premeditation and deliberation, and nullifying defense evidence that he had a severe mental disorder; and (2) that there was insufficient evidence of premeditation and deliberation. The district court's jurisdiction was conferred by 28 U.S.C. § 2254.

On May 22, 1998, the magistrate judge filed his Findings and Recommendations ("F&Rs"), recommending denial of the application for writ of habeas corpus. (Appendix E.)

On December 17, 1998, United States District Court Judge David F. Levi adopted the F&Rs in full, denied the application for writ of habeas corpus and dismissed the case. (Appendix D.) In so doing the district court found that the key distinction between the instant case and *Francis*,

> is that in *Francis* the jury was instructed that the fact of a sound mind gave rise to a presumption on the intent issue, *id.* at 315, 1971-1972. No such presumption as to the mens rea issue was asserted in the instant case. . . . [T]he jury herein was only instructed that [Respondent's] sanity was presumed--there was no instruction link-up (as in *Francis*) between his sanity and the mens rea issues.

(Appendix E at 10.) Consequently, the district court concluded that Respondent failed "to show that the state

court's ruling was not debatable among jurists of reason in terms of application of Supreme Court authority pertinent to similar due process arguments." (Appendix E at 9.)

On December 23, 1998, Respondent filed a timely notice of appeal in the Ninth Circuit, and on February 25, 1999, the district court granted a certificate of appealability limited to Respondent's "claim that due process was violated by the trial court's instruction that defendant was presumed to be sane." The district court denied a certificate of appealability on Respondent's claim of insufficient evidence. (Appendix C.) The Ninth Circuit's jurisdiction was conferred by 28 U.S.C. § 2253.

On August 16, 2000, the Ninth Circuit issued its published opinion in *Patterson* reversing and remanding "the case to the district court with instructions to grant the writ, unless the State of California grants Patterson a new trial within a reasonable period to be set by the district court." (Appendix A at 22.) Relying on *Francis*, the Ninth Circuit held "that the guilt phase instruction to presume the defendant was sane was a violation of the Due Process Clause of the Fourteenth Amendment" and that "[t]he California Court of Appeal's decision that there was no error was, in the words of AEDPA, 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' 28 U.S.C. § 2254(d)(1)."[5/] (Appendix A at 18-19.) Immediately prior to this holding, the Ninth Circuit quoted an instruction given by the trial judge at the beginning of the trial (Appendix A at 18) and then stressed that:

> Nowhere in his preliminary or concluding instructions did the judge explain that the presumption of sanity was the analytical basis for the bifurcated trial; nowhere did he provide the

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5. The Ninth Circuit further held that the error was not harmless. (Appendix A at 22.)

> *M'Naghten* definition of insanity that the jury was asked to presume; and nowhere did he warn the jury that "sane" was being used in something other than the conventional lay sense that the jurors were likely to have had in mind.

(Appendix A at 18.)

On or about August 23, 2000, after unsuccessfully searching the voluminous appellate record for a transcript which might contain the preliminary instruction quoted by the Ninth Circuit, and after contacting both the prosecutor and counsel for Respondent to inquire whether their copies of the appellate record contained a reporter's transcript with the preliminary instruction, counsel for Petitioner contacted Stephen Seferian of the Ninth Circuit's Clerk's Office by telephone to request that the Ninth Circuit provide counsel with a citation to the page(s) of the appellate record from which the preliminary instruction was quoted. Mr. Seferian informed counsel that he would contact chambers about the request. On August 25, 2000, after counsel for Petitioner was informed by telephone by Mr. Seferian that the request for record citation would have to be made in writing to the court, Petitioner prepared and served a written Request for Record Citation. (Appendix K.)

On September 11, 2000, counsel for Petitioner received a letter dated September 7, 2000, from Ninth Circuit Court Executive/Clerk of Court Cathy A. Catterson informing counsel that "[t]he Court ordered additional portions of the transcript at its own expense." Attached to the September 7, 2000, letter was a copy of the original transcript ordered by the Ninth Circuit. (Appendix L.) On page six of that transcript, the phrase "as you heard" had been underlined by hand. (Appendix L at 7.) Counsel for Petitioner subsequently determined that the Ninth Circuit had requested the partial transcript from Nevada County court reporter Penny Gordon on or about December 22, 1999, and that the phrase "as you heard" on page six of the transcript

had not been underlined by the court reporter. (Appendix M at 8.)

On September 11, 2000, the Ninth Circuit filed an order granting Petitioner's motion for stay of mandate. (Appendix B.)

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for three separate reasons. First, certiorari should be granted to preclude the Ninth Circuit's extension of this Court's decision in *Francis v. Franklin* to cases where the jury has been properly instructed on mens rea issues and where no instructional link exists between the instructions concerning specific intent and the alleged *Sandstrom*[6] error (which in this case was a single instruction accurately stating pursuant to California statute that Respondent was to be presumed sane at the guilt phase of his trial). Second, this Court should exercise its supervisory power over the federal judiciary to protect judicial integrity and ensure that the law is enforced by fair proceedings, *United States v. Hasting*, 461 U.S. 499, 505 (1983); *United States v. Payner*, 447 U.S. 727, 736, fn. 8 (1980); *Rosenberg v. United States*, 346 U.S. 273, 287 (1953), by correcting the Ninth Circuit's failure in *Patterson* to timely notify the parties that it had augmented the appellate record with a partial transcript which was then used to circumvent the state court findings of fact and support the Ninth Circuit's rationale for reversal despite language in the partial transcript which indicated that further augmentation would undermine the rationale for reversal. Third, certiorari should be granted to enable this Court to resolve the conflict between the majority opinions in *Cupp v. Naughten*, 414 U.S. 141 (1973) and *Francis v.*

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6. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

Franklin, 471 U.S. 307 (1985), thereby avoiding a gross miscarriage of justice in this and future cases.

Rule 10 of the Rules of the Supreme Court of the United States ("Rule 10") describes the considerations governing review on certiorari. It provides, in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power;
> >
> > . . .
> >
> > (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> . . . .

In the present case, certiorari should be granted for the three reasons noted above. Not only has the Ninth Circuit improperly extended this Court's *Francis* decision to

cases where the jury has been properly instructed on mens rea issues and where no instructional link exists between the instructions concerning specific intent and the alleged *Sandstrom* error, but the Ninth Circuit's opinion in *Patterson* "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power."

In his *Francis* dissent (joined by Justice O'Connor and former Chief Justice Burger), Chief Justice Rehnquist stressed that the majority's approach to the charge in *Francis* was "more like that of a zealous lawyer bent on attaining a particular result than that of the 'reasonable juror' referred to in *Sandstrom*." 471 U.S. at 332. Petitioner submits that the Ninth Circuit's approach to the charge in *Patterson* was worse than that of a zealous lawyer bent on attaining a particular result because it improperly attained its desired result by failing to timely notify the parties that it had augmented the appellate record with a partial transcript which was then used to circumvent the state court findings of fact and support the Ninth Circuit's rationale for reversal despite language in the partial transcript which strongly suggested that further augmentation would undermine the rationale for reversal. In short, the Ninth Circuit transformed a non-issue (the undisputed state court finding that the trial court had correctly advised the jurors that the case would be tried in two parts, a guilt phase and a sanity phase) into the foundation for its decision to reverse the judgment by selectively augmenting the record without notice to the parties and by disregarding language which would have caused anyone other than a "zealous lawyer bent on attaining a particular result" to have taken pause concerning the validity of the argument supporting the *Patterson* opinion.

This Court also should grant certiorari to resolve the conflict between the majority opinions in *Cupp v. Naughten* and *Francis v. Franklin*. As will be set forth in greater detail in Argument III, *infra*, Chief Justice

Rehnquist, the author of the majority opinion in *Cupp*, emphasized in his *Francis* dissent that the reasoning of the majority opinion in *Francis* "cannot be squared with *Cupp*, in which this Court emphasized that 'the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected *the entire trial* that the resulting conviction violates due process.'" 471 U.S. at 341, emphasis added.

The present case provides the perfect vehicle to resolve this conflict because the *Patterson* opinion (relying on a portion of the majority opinion in *Francis* that in turn cites *Cupp*) declined to consider the words actually spoken to the jury during the extensive questioning and preliminary instructions of the voir dire portion of the trial. In so doing, the *Patterson* opinion has ignored the language spoken to the jury which eviscerates the Ninth Circuit's speculative rationale for reversal. (Appendix J at 5-6, 11-13, 15-19, 21-22, 33, 39, 41-43, 47, 50-52, 56-59, 61-62, 64, 72-74, 78-79, 82, 88-89, 92-94, 97-101, 105-106, 112, 117, 119, 131-132, 145-146, 149, 156, 159-162, 168, 170-171, 174-176, 183.) By granting certiorari to resolve the conflict between *Cupp* and *Francis*, this Court will be able to reverse the dangerous precedent set by the *Patterson* opinion, thereby preventing a gross miscarriage of justice in this and future cases.

ARGUMENT

I.

THE NINTH CIRCUIT ERRED BY EXTENDING *FRANCIS* TO THE PRESENT CASE WHERE THE JURY WAS PROPERLY INSTRUCTED ON MENS REA ISSUES AND WHERE THERE WAS NO INSTRUCTIONAL LINK BETWEEN THE INSTRUCTIONS CONCERNING SPECIFIC INTENT FOR FIRST DEGREE MURDER AND THE ALLEGED *SANDSTROM* ERROR, A SINGLE INSTRUCTION ACCURATELY STATING PURSUANT TO CALIFORNIA STATUTE THAT RESPONDENT WAS TO BE PRESUMED SANE AT THE GUILT PHASE OF HIS TRIAL

Relying on *Francis v. Franklin*, 471 U.S. 307 (1985), the Ninth Circuit held in *Patterson* that a jury instruction which requires a jury to presume that a defendant is sane at the guilt phase of a murder trial, without providing the legal definition of sanity,[7] violates the Due Process

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7. The challenged instruction reads as follows: "At the time of the alleged offense charged in the information, you are instructed to presume the defendant was sane." AEOR 34; RT 1670. The instruction was taken from section 1026, which provides in pertinent part:

> (a) When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed.

Clause of the Fourteenth Amendment and is not harmless error.

In *Francis*, the jury was instructed that the fact of a sound mind gave rise to a presumption *on the intent issue* as follows:

> (1) "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted" and (2) "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted."

471 U.S. at 309. *Francis* held that these instructions violated the Due Process Clause by "creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of intent." 471 U.S. at 325.

A. The Ninth Circuit Improperly Extended *Francis* To Cases Where The Jury Has Been Properly Instructed On Mens Rea Issues And Where No Instructional Link Exists Between The Instructions Concerning Specific Intent And The Alleged *Sandstrom* Error

Certiorari should be granted to correct the Ninth Circuit's improper extension of *Francis*. As stated by the state appellate court, *Francis* was "inapposite" because "the trial court expressly instructed the jury it could consider evidence of defendant's mental disability in determining whether he formed 'the mental state or specific intent' necessary for murder."[8] As explained by the Honorable

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8. Immediately preceding the challenged instruction, the trial court

David F. Levi and Magistrate Judge Hollows, the key distinction between the instant case and *Francis*,

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instructed the jury as follows:

> Evidence has been received regarding a mental disease or mental disorder of the defendant at the time of the crime in the information. You may consider such evidence solely for the purpose of determining whether or not the defendant actually formed the mental state *or specific intent* which is an element of the crime charged in the information, and are found in the definitions of murder.
>
> If from all of the evidence you determine to be credible you have a reasonable doubt whether the defendant formed any required mental state or had the necessary specific intent, you must find that he did not have such mental state or specific intent.

AEOR 33, italics added; RT 1669-1670; SEOR 3-4. (The italicized portion of the above instruction was included in the written jury instructions given to the jury but was omitted when the judge read the instructions to the jury.) Furthermore, as noted in the magistrate judge's F&Rs,

> the trial court immediately followed these instructions with the definitions of murder and the intent level that must be proved, including malice aforethought and willful deliberation and premeditation. See RT 1670-72. The court also described the different degrees of homicide and instructed that in order to find first degree murder, the jury must find that malice aforethought and deliberation and premeditation were proved beyond a reasonable doubt. RT 1670, 1672, 1674. The court additionally instructed the jury that petitioner was presumed innocent until proven guilty beyond a reasonable doubt by the People who had the burden of proof. RT 1668.

Appendix E at 8-9; AEOR 25-26; see SEOR 2-8. The aforementioned instructions as well as the pertinent instructions on circumstantial evidence are set forth in Appendix N.

> is that in *Francis* the jury was instructed that the fact of a sound mind gave rise to a presumption on the intent issue, *id.* at 315, 1971-1972. No such presumption as to the mens rea issue was asserted in the instant case. . . . [T]he jury herein was only instructed that [Respondent's] sanity was presumed--there was no instruction link-up (as in *Francis*) between his sanity and the mens rea issues.

(Appendices D and E at 10.) Consequently, the district court concluded that Respondent failed "to show that the state court's ruling was not debatable among jurists of reason in terms of application of Supreme Court authority pertinent to similar due process arguments." (Appendix E at 9.)

Petitioner submits that the federal district court and the state courts were correct in determining that there was no *Francis/Sandstrom* error in the present case. Employing the words of Chief Justice Rehnquist's *Francis* dissent, Petitioner submits that the *Patterson* "decision needlessly extends" this Court's "holding in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), to cases where the jury was not required to presume conclusively an element of a crime under state law." 471 U.S. at 332. As Chief Justice Rehnquist explained in his majority opinion in *Cupp*,

> Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.

414 U.S. at 146. The Ninth Circuit erred by holding that the challenged instruction in this case violated the Due

Process Clause of the Fourteenth Amendment and is not harmless error.[9/]

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9. As stated above, Petitioner submits that there was no *Francis/Sandstrom* error in the present case. Assuming arguendo that the challenged instruction was improperly given under state law, Petitioner submits that any error in giving the instruction was harmless in light of the overwhelming evidence of Respondent's specific intent to commit first degree murder. With the exception of Respondent's sister, all of the people who observed Respondent in the hours before the murder and shortly after the murder thought Respondent appeared to be rational, and they saw nothing unusual about Respondent's behavior. (RT 131, 135, 201-203, 209, 237-240, 244, 246, 252, 284, 300, 328-330, 388-399, 400-402, 416, 454, 458, 464-466, 468, 601-602, 605-608, 926-927, 1476-1477, 1480, 1509.) Petitioner submits that even if the challenged jury instruction had not been given the jury would have concluded that Respondent wanted to commit suicide and kill Adrianna because of his bad financial situation (RT 145-146, 156-157, 171, 175, 403, 406), because of marital problems and family problems (RT 154, 162, 175, 184, 189, 199, 200, 403, 406, 413, 460, 474), because he was disappointed that Ross Perot had lost the election (RT 129, 1607) and because of the negative outlook he held for both himself and his children. (RT 153-154, 278, 281-282, 293-294, 953-955, 1603-1604.) Respondent told Dr. Lyons that "I was not looking for courage. It was just a way out of trouble." (RT 1455.)

The jury reasonably concluded that Respondent had planned to kill himself and Adrianna even before he left Willits. Immediately before Respondent left with Adrianna, he told Mrs. Hodges that "'Sheila [Respondent's wife] will be happy here. This is where she's always wanted to be.'" (RT 123-124, 135-136.) After leaving Willits, Respondent drove Adrianna to the Golden Gate Bridge, which is known as a suicide magnet, and he drove across the bridge "quite a few times." (RT 167, 579, 616, 713, 731-732, 857, 951, 1453.) Dr. Lyons testified that Respondent "said, 'She [Adrianna] did not know that she would not be coming back. I told her I would take her to see the Golden Gate Bridge." (RT 1453.)

Respondent previously had stated that he needed help to kill himself (RT 592, 954), and the expert psychiatric testimony established that it is common for those committing suicide to take loved ones with them. (RT 868-869, 921-922, 954, 1521.) Dr. Bittle interpreted the fact that Respondent did not stop the car on the Golden Gate Bridge and attempt suicide there as indicative of the fact that he simply had not

decided to commit the act at that time. (RT 1009.) Dr. Bittle testified that, "[i]n my opinion, in those two hours [while Respondent was by the side of the road near Floriston] . . . he was trying to determine whether or not he was going to destroy himself, commit suicide and how his daughter might be involved in that. I think he was actively suicidal." (RT 952, 970.) Around noon, Respondent told Judy Tye "that it was time that he did something about his problems . . . ." (RT 282.)

As Respondent looked at Mr. Prebble's truck approaching, he made a cold, calculated decision to kill himself and Adrianna. (RT 260, 747-748, 875-876, 974-975.) Respondent picked up Adrianna and ran straight toward Prebble's truck with a look of determination on his face. (RT 260.) When Prebble "swerved to the left" to avoid hitting Respondent and Adrianna, Respondent ran faster trying to get in front of Prebble's truck, and Respondent finally lunged for the truck holding Adrianna out in front of him and shoving Adrianna into the truck. (RT 260-262, 268-269, 307-308, 310, 312, 318.)

On April 1, 1993, Respondent told Sergeants Hanson and Perrea that, just before he grabbed Adrianna, "'I think I quit thinking about it and I just did it.'" (RT 748-750.) According to Dr. Bittle, Respondent's April 1, 1993, statement, "'I think I stopped thinking about it and just did it'" implied "that he had been contemplating and considering this behavior . . . and that there was some control over this behavior in this decision to initiate this action." (RT 971.)

Although Respondent was oriented to time, place, person and events, he continued to change his story about what had happened. (RT 92-96, 105, 361, 365, 469, 475-476, 479-480, 486-487, 616, 934-940, 1511-1512.) Respondent was not delusional and was not experiencing hallucinations when he was examined by Dr. MacQuarrie shortly after the murder. (RT 100.) Dr. MacQuarrie testified that Respondent seemed okay except that he appeared to be lying about the event. (RT 97, 105, 110-112, 117-119.) According to Dr. Lyons, "a lot of what Mr. Patterson says is contrived." (RT 1511.) Dr. Lyons testified that the inconsistencies in Respondent's stories showed "an ability to think, first of all. It shows an ability to change a story, to think it over and change. And it shows an ability to gauge what will be the likely effect. You know, I'll try one thing, see if that works. If it doesn't I'll modify it and . . . try to tailor it to be a little better." (RT 1512.)

Petitioner submits that, from the evidence presented, the jury reasonably inferred that: Respondent planned to kill Adrianna in order to facilitate his own suicide. Respondent initiated the plan before he left

B. The Ninth Circuit's Approach To The Jury Instructions In *Patterson* Exemplifies Chief Justice Rehnquist's Criticism In *Francis* That "The Court's Approach To The Charge Is More Like That Of A Zealous Lawyer Bent On Attaining A Particular Result Than That Of The 'Reasonable Juror' Referred To In *Sandstrom*"

In order to justify its reversal of Judge Levi's denial of habeas relief and in order to find that the state court decision was "in the words of AEDPA, 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States'" (28 U.S.C. § 2254(d)(1)), the Ninth Circuit concocted a speculative rationale based upon the theory that the jury could have been confused by the challenged instruction's failure to define sanity and therefore might have relied upon a lay definition of insanity which could have shifted the burden of proof to Petitioner. In so

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Willits. Respondent rejected his initial plan to commit the murder/suicide on the Golden Gate Bridge because he loved his daughter and because the death would not be sufficiently swift and certain. Respondent then began searching for the most swift, certain and efficient method of committing the murder/suicide. After waiting along the roadside for the right vehicle and the right time, Respondent finally saw Mr. Prebble's semi trailer truck and made the decision that running in front of such a large truck would lead to instant death for both himself and Adrianna. Respondent then carried out his cold, calculated decision to kill Adrianna by picking her up, running directly at the oncoming truck and lunging at the truck when Mr. Prebble swerved to avoid Respondent's determined effort to kill Adrianna. (See pages nine through twelve of the F&Rs (Appendix E at 11-15).

In short, Respondent cannot establish that the challenged instruction so infected the entire trial as to establish a violation of due process, and Respondent cannot meet his burden under *Brecht v. Abrahamson*, 507 U.S. 619 (1993) to show that the challenged jury instruction had a "substantial and injurious effect or influence in determining the jury's verdict."

doing, the Ninth Circuit ignored the undisputed findings by the state appellate court that the trial court had correctly advised the jurors prior to the guilt phase "that the case would be tried in two parts, a guilt phase and a sanity phase," and that "trial counsel did not take issue with the challenged instruction."[10/] The Ninth Circuit also ignored the fact that, unlike the jury in *Francis* which requested reinstruction on the element of intent and the definition of accident, 471 U.S. at 312, 326, the jury in the present case never requested reinstruction concerning either the challenged instruction or the instruction on the use of evidence of mental disease or mental disorder to determine Respondent's specific intent.

In order to bolster its speculative rationale, the Ninth Circuit states that "the prosecutor in closing argument

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10. Such findings are presumed to be correct under federal law. 28 U.S.C. § 2254(e)(1); see also *Sumner v. Mata*, 449 U.S. 539 (1981) [presumption of correctness equally applicable to state appellate court findings of fact]; *Burks v. Borg*, 27 F.3d 1424, 1427-1428 (9th Cir. 1994) [factual findings entitled to the presumption may be made at any point in the process].

Undoubtedly because he knew that the jurors had been correctly informed in the course of voir dire about the bifurcated nature of the trial, Respondent's appellate counsel never sought to augment the state appellate record to include transcripts of the voir dire proceedings. In this regard, it should be noted that appellate courts normally presume that the jury has been correctly instructed when instructions are not set out in the transcript on appeal. See *Alberty v. United States*, 91 F.2d 461, 463 (9th Cir. 1937) ["the court's instructions to the jury are not set out, so we presume that they were correctly instructed as to the evidence offered"]; *People v. Hood*, 140 Cal.App.2d 585, 589, 295 P.2d 525, 528 (1956) ["the court's instructions to the jury are not included in the record and we cannot presume that erroneous instructions were given"]; *People v. Gonzales*, 87 Cal.App.2d 867, 880, 198 P.2d 81, 89 (1948) ["Since defendant, on appeal, failed to bring up the instructions, both given and refused, we cannot, under these circumstances, presume that the trial court failed or refused to instruct the jury as indicated."]. It also should be noted that Respondent's appellate counsel has never alleged that trial counsel was ineffective for failing to object to the challenged instruction.

repeatedly relied on the presumption to tell the jury that petitioner's evidence was legally irrelevant and must be disregarded." (Appendix A at 20.) Unfortunately, the quotation provided by the Ninth Circuit to support this claim distorts the record by stringing together a few brief comments of the prosecutor which were made over the course of his lengthy closing argument (RT 1675-1730, 1760-1767, 1781-1797), by deleting the immediately preceding reference to prior discussion of the issue during voir dire (RT 1679) and by changing the meaning of the quotation by erroneously moving a sentence from the beginning of a subsequent paragraph to the end of the preceding paragraph (RT 1679-1680), thereby significantly changing the quotation's meaning because the transported sentence ("Mr. Patterson has attempted to show that because of his mental condition, he didn't form an intent, the intent required or [sic] premeditate or deliberate") actually was the introduction to a lengthy discussion of the evidence which established Respondent's specific intent for first degree murder.

As will be discussed, *infra*, in Argument II, the *Patterson* court's approach to the charge must be deemed worse than that of the "zealous lawyer" described by Chief Justice Rehnquist because it failed to notify the parties that it had augmented the appellate record with a partial transcript which was then used to circumvent the state court findings of fact and support the Ninth Circuit's rationale for reversal despite language in the partial transcript which strongly suggested that further augmentation would undermine the rationale for reversal.

II.

THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO CORRECT THE NINTH CIRCUIT'S FAILURE TO NOTIFY THE PARTIES THAT IT HAD AUGMENTED THE APPELLATE RECORD WITH A PARTIAL TRANSCRIPT WHICH WAS THEN USED TO SUPPORT ITS RATIONALE FOR REVERSAL DESPITE LANGUAGE IN THE AUGMENTED TRANSCRIPT WHICH INDICATED THAT FURTHER AUGMENTATION WOULD UNDERMINE THE RATIONALE FOR REVERSAL

On or about December 22, 1999, the Ninth Circuit sought to expand the appellate record by requesting Nevada County court reporter Penny Gordon to prepare and send the court one original copy of the trial court proceeding held at 4:30 p.m. on November 19, 1993. This request was made and the transcript successfully obtained without providing notice of the augmentation to the parties. The Ninth Circuit then used a portion of that transcript as a basis for the reversal of the judgment. It did so despite the fact that the very quotation from the augmented transcript which the *Patterson* court relied upon to reverse the district court contained a statement by the trial court which strongly indicates that the trial court and/or counsel *had discussed the pertinent issue before the jury at an earlier stage of the proceedings* (either during the November 19, 1993, session prior to 4:30 p.m. or during the voir dire proceedings on November 18, 1993). There can be no doubt that the Ninth Circuit was aware that additional augmentation would have

shed light on what information the jurors were actually given because the words "as you heard" on page six of the original copy of the augmented transcript in the possession of the Ninth Circuit had been underlined by hand. (Appendix L at 7.) However, the Ninth Circuit never sought to further expand the record to include the earlier proceedings which would have clarified the jury's true understanding of the bifurcated proceedings and which would have undermined the Ninth Circuit's speculative argument that the jury might have relied upon an everyday definition of the word sane.

Since the Ninth Circuit never provided Petitioner with notice of the augmentation (and did not respond to Petitioner's August 25, 2000, written request for record citation until September 7, 2000), Petitioner was precluded from challenging the augmentation or requesting further augmentation to support the state court's findings. Consequently (despite the presumption of correctness under federal law which should be accorded to the state court findings; despite appellate counsel's concession that the trial court correctly advised the jury about the bifurcated nature of the trial; despite the fact that appellate counsel has never claimed ineffective assistance of trial counsel due to trial counsel's failure to object; despite the fact that the jury never requested reinstruction concerning either the challenged instruction or the instruction on the use of evidence of mental disease or mental disorder to determine Respondent's specific intent; and despite the fact that the very quotation obtained without notice to the parties indicates that the jurors previously had been given additional information concerning the bifurcated proceedings), the Ninth Circuit issued a published opinion reversing Respondent's first degree murder conviction and ordering a retrial of this lengthy murder case. In so doing, the *Patterson* opinion has ignored extensive and detailed language spoken to the jury which fully supports the state court's findings of fact and which eviscerates the Ninth Circuit's speculative rationale for reversal. (Appendix J at

5-6, 11-13, 15-19, 21-22, 33, 39, 41-43, 47, 50-52, 56-59, 61-62, 64, 72-74, 78-79, 82, 88-89, 92-94, 97-101, 105-106, 112, 117, 119, 131-132, 145-146, 149, 156, 159-162, 168, 170-171, 174-176, 183.) In short, the transcript of the voir dire proceedings conclusively demonstrates: 1) that the jurors were warned that "sane" was being used in something other than the conventional lay sense (Appendix J at 11-13, 15-16, 19, 21-22, 33, 42-43, 47, 72-73, 78-79, 82, 88, 92-94, 97-101, 105-106, 112, 119, 131-132, 145-146, 149, 156, 159-162, 170-171, 174-176); 2) that it was explained to the jurors that the presumption of sanity was the analytical basis for the bifurcated trial (Appendix J at 5-6, 11, 16-18, 39, 41-42, 51, 58-59, 79, 89, 175, 183); and 3) that the judge provided the jurors with the *M'Naghten* definition of insanity that the jury was asked to presume (Appendix J at 50-52, 57, 64, 72-73, 88, 93-94, 97-98, 105-106, 119, 149).

Petitioner submits that the *Patterson* court's approach to the charge was worse than that of "a zealous lawyer bent on attaining a particular result" because it improperly attained that result by failing to give notice to the parties of the augmented record used to reverse the judgment and because it did not pursue further augmentation to follow up on the trial court's language suggesting that the jury had been earlier instructed concerning the nature of the bifurcated proceeding. In short, the Ninth Circuit transformed a non-issue (the undisputed fact that the trial court had correctly advised the jurors that the case would be tried in two parts, a guilt phase and a sanity phase) into the foundation for its decision to reverse the judgment by selectively augmenting the record without notice to the parties and by disregarding language which would have caused anyone other than a "zealous lawyer bent on attaining a particular result" to have taken pause concerning the validity of the argument supporting the court's opinion.

Given the extraordinary circumstances created by the Ninth Circuit's actions in this case, Petitioner submits that this Court should exercise its supervisory power over

the federal judiciary to protect judicial integrity and ensure that the law is enforced by fair proceedings. *United States v. Hasting*, 461 U.S. 499, 505 (1983); *United States v. Payner*, 447 U.S. 727, 736, fn. 8 (1980); *Rosenberg v. United States*, 346 U.S. 273, 287 (1953). As this Court noted in *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 676 (1944), "[w]hen events subsequent to an appeal may affect the correctness of the judgment appealed from, this Court may vacate the judgment and remand the cause for further proceedings." *See also Dickerson v. United States*, _ U.S. __, 120 S.Ct. 2326, 2332 (2000) [Supreme Court may use its supervisory authority over the federal courts "to prescribe rules of evidence and procedure that are binding in those tribunals"]; *Frazier v. Heebe*, 482 U.S. 641, 647 fn. 7 (1987) [Supreme Court's "supervisory power over federal courts allows the Court to intervene to protect the integrity of the federal system"]; *Hobby v. United States*, 468 U.S. 339, 349 (1984) ["this Court's 'supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence'"]; *Singer v. United States*, 380 U.S. 24, 36 (1965) ["the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result"]; *Mesarosh v. United States*, 352 U.S. 1, 14 (1956) [the Supreme Court has a duty under its supervisory jurisdiction over the proceedings in the federal courts "to see that the waters of justice are not polluted"]; *Communist Party of the United States v. Subversive Activities Control Board*, 351 U.S. 115, 124 (1956) ["fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted"]; *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 260 (1953) [the responsibility lies with the Supreme Court to define

fundamental requirements to be observed by the courts of appeals and insure their observance].

III.

BY RESOLVING THE CONFLICT BETWEEN THE MAJORITY OPINIONS IN *CUPP* AND *FRANCIS*, THIS COURT CAN REVERSE THE DANGEROUS PRECEDENT SET BY THE NINTH CIRCUIT IN *PATTERSON* AND ENSURE THAT THE WORDS ACTUALLY SPOKEN TO THE JURY DURING THE ENTIRE TRIAL ARE CONSIDERED IN DETERMINING WHETHER THE "REASONABLE JUROR" REFERRED TO IN *SANDSTROM* WOULD HAVE CONSIDERED THE CHARGE TO HAVE CREATED AN UNCONSTITUTIONAL PRESUMPTION

In his majority opinion in *Cupp*, Chief Justice Rehnquist recognized "the well established proposition that a single instruction to a jury may not be judged in isolation, but must be viewed in the context of the overall charge." 414 U.S. at 146-147. He then explained that:

> While this does not mean that an instruction by itself may never rise to the level of constitutional error, [citation omitted], it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but *the process of instruction itself is but one of several*

> *components of the trial which may result in the judgment of conviction.*

414 U.S. at 147, italics added. Chief Justice Rehnquist then added that "the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected *the entire trial* that the resulting conviction violates due process." *Id.*, italics added.

In his *Francis* dissent, Chief Justice Rehnquist emphasized that the reasoning of the majority opinion in *Francis* "cannot be squared with *Cupp*," 471 U.S. at 341, and reiterated the above quoted language from *Cupp* that "'the question is . . . whether the ailing instruction by itself so infected *the entire trial* that the resulting conviction violates due process.'" 471 U.S. at 336 and 341, italics added.

Although the *Patterson* opinion recognized that "[u]nder *Francis*, we do not consider a particular instruction in isolation, but rather consider 'the potentially offending words . . . in the context of the charge as a whole.' 471 U.S. at 315." (Appendix A at 17), the *Patterson* opinion further stated that "[e]ven interpreting 'charge' broadly (probably more broadly than *Francis* intended) to include preliminary as well as concluding instructions, we believe that the instruction was constitutionally flawed." (Appendix A at 17.) The *Patterson* court undoubtedly employed this reasoning to justify its failure to further augment the record.

However, even the majority opinion in *Francis* can be interpreted as supporting the conclusion that all components of the trial, including preliminary instructions and questioning during voir dire, should be examined to determine whether the "reasonable juror" referred to in *Sandstrom* would have considered the charge to have created an unconstitutional presumption. The majority opinion in *Francis* recognized that:

> Other instructions might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption. *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). This analysis "*requires careful attention to the words actually spoken to the jury* . . . , for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Sandstrom, supra*, 442 U.S., at 514, 99 S.Ct., at 2454.

471 U.S. at 315, italics added.

Petitioner submits that the present case provides the perfect vehicle to resolve the conflict between the majority opinions in *Cupp* and *Francis* because the *Patterson* opinion (relying on a portion of the majority opinion in *Francis* that in turn cites *Cupp*) declined to consider the words actually spoken to the jury during the extensive questioning and preliminary instructions of the voir dire portion of the trial. (Appendix A at 17.) In so doing, the *Patterson* opinion has ignored the language spoken to the jury which eviscerates the Ninth Circuit's speculative rationale for reversal. (Appendix J.) Petitioner submits that once the *Patterson* court decided to augment the appellate record in order to invalidate the state court findings, it should have been obligated in the interest of fairness and justice to consider the preliminary instructions and questioning during voir dire before determining whether the "reasonable juror" referred to in *Sandstrom* would have considered the charge to have created an unconstitutional presumption.

By granting certiorari to resolve the conflict between *Cupp* and *Francis*, this Court will be able to reverse the dangerous precedent set by the *Patterson* opinion, thereby preventing a gross miscarriage of justice in this and future cases.

CONCLUSION

For the foregoing reasons, Petitioner prays the petition for writ of certiorari be granted.

Dated: October 12, 2000.

Respectfully submitted,

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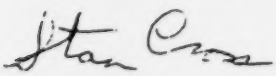

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

JAMES H. GOMEZ, Director
Petitioner,

v.

MITCHELL ALFRED PATTERSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

APPENDIX
Volume I of II (A - I)

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MITCHELL ALFRED PATTERSON, Petitioner-Appellant, v. JAMES H. GOMEZ, Director, Respondent-Appellee.	)	No. 99-15530 D.C. No. CV-96-01546-DFL **OPINION**

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
December 10, 1999--San Francisco, California

Filed August 16, 2000

Before: Joseph T. Sneed, Harry Pregerson, and
William A. Fletcher, Circuit Judges.

Opinion by Judge W. Fletcher

SUMMARY

Criminal Law and Procedure/Jury Instructions

The court of appeals reversed a judgment of conviction. The court held that a jury instruction that requires a jury to presume that a defendant is sane at the

guilt phase of a murder trial, without providing the legal definition of sanity, violates the Due Process Clause of the Fourteenth Amendment and is not harmless error.

Appellant Mitchell Patterson, who had a history of depression and suicide attempts, drove his wife and children to his wife's parents' home. He was having serious marital and financial difficulties, had not slept for three days, and had discontinued taking his prescribed psychotropic medications. He left his in-law's home with his 10-year-old daughter, Adrianna, and drove until he ran out of gas on the interstate highway near the Nevada border. Patterson and Adrianna were sitting beside the road when a large semi truck approached. Patterson grabbed Adrianna, ran onto the freeway, and lunged in front of the truck. Adrianna was killed.

Patterson was charged with first degree murder in California state court. He pled not guilty and, alternatively, not guilty by reason of insanity. The state court trial was bifurcated into a guilt phase and a sanity phase in accordance with California's standard practice. At the conclusion of the guilt phase trial, the jury was instructed to presume that Patterson was sane. The jury found him guilty of first degree murder. The same jury then hung on the question whether he was sane. A second jury, empaneled to try only the sanity question, found Patterson sane.

After exhausting his direct appeals in state court, Patterson petitioned for a writ of habeas corpus in federal district court, claiming violations of due process because of an alleged insufficiency of the evidence and because of an improper presumption contained in the jury instruction. The district court denied the petition. It then issued a certificate of appealability on Patterson's jury instruction claim.

[1] A jury instruction cannot relieve the state of the burden of proving beyond a reasonable doubt a crucial element of the criminal offense. The Supreme Court has held that the proper inquiry is whether the challenged jury instruction had the effect of relieving the State of the burden of proof on the critical question of petitioner's state of mind. If a reasonable juror could have given the presumption conclusive or persuasion-shifting effect, the instruction is unconstitutional. To determine whether a jury instruction unconstitutionally shifts the burden of proof, courts must inquire whether there is a reasonable likelihood that the jury has applied the challenged instruction in an unconstitutional manner.

[2] At the conclusion of the guilt phase, the state court judge instructed the jury to presume that Patterson was sane at the time of the alleged offense. [3] Not only was the instruction not a standard jury instruction in California, but an earlier version of the instruction had been specifically disapproved for use in cases where a specific intent crime was charged if there was evidence of diminished capacity.

[4] Under California law, a criminal defendant is allowed to introduce evidence of the existence of a mental disease, defect, or disorder as a way of showing that he did not have the specific intent for the crime. If the jury is required to presume the non-existence of the very mental disease, defect, or disorder that prevented the defendant from forming the required mental state for first degree murder, that presumption impermissibly shifts the burden of proof for a crucial element of the case from the state to the defendant. Whether the jury was required to presume the non-existence of a mental disease, defect, or disorder depended on the definition of sanity that a reasonable juror could have had in mind.

[5] Under lay definitions of the word "sane" found in a dictionary, the instruction to presume that Patterson was

sane impermissibly relieved the state of its burden to prove beyond a reasonable doubt that defendant had the mental state necessary to commit first degree murder under California law.

[6] To convict a defendant of first degree murder, the state must prove beyond a reasonable doubt that the defendant was guilty of willful, deliberate, and premeditated killing. Where evidence is introduced at trial that a defendant was suffering from a mental disease, defect, or disorder, the jury is entitled to consider evidence of such disease, defect, or disorder in determining whether the defendant actually had the mental state necessary for first degree murder. But if a jury is instructed that a defendant must be presumed sane a reasonable juror could well conclude that he or she must presume that the defendant had no such mental disease, defect, or disorder. If a juror so concludes, he or she presumes a crucial element of the state's proof that the defendant was guilty of willfulness, premeditation, and deliberation.

[7] A particular instruction is not considered in isolation, but rather the potentially offending words are considered in the context of the charge as a whole. [8] Nowhere in the trial judge's preliminary or concluding instructions did he explain that the presumption of sanity was the analytical basis for the bifurcated trial; nowhere did he provide the definition of insanity that the jury was asked to presume; and nowhere did he warn the jury that "sane" was being used in something other than the conventional lay sense that the jurors were likely to have had in mind. [9] The guilt phase instruction to presume Patterson was sane was a violation of the Due Process Clause of the Fourteenth Amendment.

[10] A constitutional error is harmless on federal habeas review of a state court conviction unless it had

substantial and injurious effect or influence in determining the jury's verdict.

[11] Patterson's mental state was the primary issue throughout the guilt phase of the trial. He argued that he did not have the mental state necessary for first degree murder. Any presumption that relieved the state of its burden to prove a crucial element of such mental state necessarily played an important role in the jury's ultimate determination of guilt.

[12] Because the *M'Naughten* definition of sanity is harder to satisfy than the lay definition, it was possible that a jury unwilling to find unanimously that Patterson was sane under *M'Naughten* would also have been unwilling, if properly instructed, to find that he had the mental state necessary for first degree murder. [13] The instruction had a substantial and injurious effect or influence in determining the jury's verdict.

COUNSEL

Charles M. Bonneau, Sacramento, California, for the petitioner-appellant.

Stan Cross, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

W. FLETCHER, Circuit Judge:

Petitioner Mitchell Alfred Patterson appeals the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner asserts that an instruction requiring the jury to presume him sane at the guilt phase of his murder trial violated the Due Process Clause of the

Fourteenth Amendment. We hold in the circumstances of this case that the instruction was constitutional error, and that the error was not harmless. We reverse the decision of the district court.

I

Petitioner had a history of depression leading up to the events in this case. In 1989, he was hospitalized after an attempted suicide. On March 30, 1993, he was experiencing serious marital and financial difficulties, had not slept for three days, and had discontinued taking his prescribed psychotropic medications. On that day, petitioner drove his wife and three children several hours from their home in Lincoln, California, a town about an hour east of Sacramento, to his wife's parents' home in Willits, about 140 miles north of San Francisco. Later that day, he left with his 10-year-old daughter, Adrianna, ostensibly to buy ice cream. As they left the house, he told his mother-in-law that his "wife will be happy here. This is where she's always wanted to be."

Petitioner drove south to San Francisco, drove back and forth across the Golden Gate bridge at least twice, and then drove about 200 miles east to the Sierra Nevada mountains. Witnesses saw his pickup truck the next morning on the shoulder of Interstate 80 about ten miles east of Truckee, near the Nevada border, where he had run out of gas. At about 11:30 a.m., he used the car phone of a passing motorist to call his wife and ask her to send her sister to pick them up. Several motorists testified that they saw petitioner and Adrianna walking along Interstate 80 between 11:30 a.m. and sometime after 1:00 p.m.

Between 1:20 and 1:25 p.m., petitioner and Adrianna were sitting beside the road, eating a sandwich they had been given by a passing motorist. A large semi truck approached. Petitioner grabbed Adrianna in his arms, ran onto the freeway, and lunged in front of the truck. The

driver swerved into another lane but was unable to avoid them. Adrianna was killed. Petitioner survived with compound fractures in his hands. Petitioner offered various explanations for running in front of the truck: he asserted that it was an "accident"; that he was mentally ill; that he was hallucinating, seeing smoke and people being burned on crosses; that he believed that people were after them who would inflict a "slow and arduous death"; and that he ran onto the freeway to kill himself and Adrianna in order to avoid a worse form of death.

Petitioner was charged with first degree murder in California state court. He pled not guilty and, alternatively, not guilty by reason of insanity. The state court trial was bifurcated into a guilt phase and a sanity phase in accordance with California's standard practice. At the conclusion of the guilt phase trial, the jury was instructed to presume that petitioner was sane. The jury found petitioner guilty of first degree murder. The same jury then hung on the question whether petitioner was sane. A second jury, empaneled to try only the sanity question, found petitioner sane.

After exhausting his direct appeals in state court, petitioner brought a petition in federal district court for a writ of habeas corpus under 28 U.S.C. § 2254. He asserted violations of due process because of an alleged insufficiency of the evidence and because of an improper presumption contained in the jury instruction. Affirming the findings and recommendation of the magistrate judge, the district court denied the petition. It then issued a certificate of appealability on petitioner's jury instruction claim.

II

We review *de novo* a district court's decision to deny a habeas petition under 28 U.S.C. § 2254. See *Houston v. Roe*, 177 F.3d 901, 905 (9th Cir. 1999). Under the

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we can reverse a state court decision denying relief only if that decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The "Supreme Court need not have addressed a factually identical case[;] § 2254(d) only requires that the Supreme Court clearly determine the law." *Houston*, 177 F.3d at 906. "[O]ur independent review of the legal question . . . [must] leave[ ] us with a 'firm conviction' that one answer, the one rejected by the [state] court, was correct and the other, the application of the federal law that the court adopted, was erroneous -- in other words that clear error occurred. " *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000).

III

We first address whether the jury instruction violated the Due Process Clause of the Fourteenth Amendment.

A

[1] A jury instruction cannot relieve the state of the burden of proving beyond a reasonable doubt a crucial element of the criminal offense. In *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979), the Supreme Court held the proper inquiry to be "whether the challenged jury instruction had the effect of relieving the State of the burden of proof . . . on the critical question of petitioner's state of mind." If a "reasonable juror could have given the presumption conclusive or persuasion-shifting effect," the instruction is unconstitutional. *Id.* at 519. In *Francis v. Franklin*, 471 U.S. 307, 325 (1985), the Supreme Court held that an instruction was unconstitutional "[b]ecause a reasonable juror could have understood the challenged portions of the jury instruction in this case as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of intent[.]"

We have held that to determine whether a jury instruction unconstitutionally shifts the burden of proof, we must inquire "'whether there is a reasonable likelihood that the jury has applied the challenged instruction' in an unconstitutional manner." *Houston*, 177 F.3d at 909 (citations and quotations omitted).

In both *Sandstrom* and *Francis*, the Supreme Court held jury instructions invalid for unconstitutionally shifting the burden of proof.[1] In *Sandstrom*, the defendant admitted killing the victim but contended that he did not have the required mental state. If the defendant had acted "purposely or knowingly," he would have been guilty of

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1. We applied *Sandstrom* and *Francis* in *McKenzie v. Risley*, 842 F.2d 1525 (9th Cir. 1988) (en banc), a capital murder case in which the defendant had been convicted of "deliberate homicide" under Montana law. We were split as to whether the errors were harmless, but we were unanimous in holding that the jury instructions violated due process. We quoted samples of the flawed instructions in our opinion:

> [T]he law presumes, that is, the law expressly directs the jury to reason: That an unlawful act was done with an unlawful intent and also that a person is presumed to intend the ordinary consequences of his voluntary act.
>
> . . . .
>
> Further, unless you are otherwise instructed with regard to a particular presumption, all presumptions are rebuttable; that is, they may be controverted and overcome by other evidence.

Id. at 1529. We wrote:

> Similar instructions were given on the elements of various offenses. While these instructions did not require the jury to conclusively presume intent, they did permit a rational juror to believe that intent could be found without proof by the prosecution, thereby shifting the burden of proof on this issue to the defense.

Id. at 1529-30.

"deliberate homicide" under Montana law; but if he had acted without that mental state, he would have been guilty of a lesser degree of homicide. After having been instructed that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," the jury convicted defendant of "deliberate homicide." *Sandstrom*, 442 U.S. at 513. The Supreme Court held that the instruction violated due process:

> Given the common definition of 'presume' as 'to suppose to be true without proof,' Webster's New Collegiate Dictionary 911 (1974), and given the lack of qualifying instructions as to the legal effect of the presumption, we cannot discount the possibility that the jury may have interpreted the instruction in either of two more stringent ways.
>
> First, a reasonable jury could well have interpreted the presumption as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption.
>
> Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their "ordinary" consequences), unless *the defendant* proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence -- thus effectively shifting the burden of persuasion on the element of intent.
>
> * * *
>
> [T]he question before this Court is whether the challenged jury instruction had the effect of

> relieving the State of the burden of proof enunciated in [*In re*] *Winship* on the critical question of petitioner's state of mind. We conclude that under either of the two possible interpretations of the instruction set out above, precisely that effect would result, and that the instruction therefore represents constitutional error.

Id. at 517, 521 (emphasis in original).

In *Francis*, defendant was convicted under Georgia law of "malice murder," which required the defendant to have acted with malice aforethought. The prosecution contended that defendant had fired the fatal shot deliberately. The defendant contended that he had done so accidentally. The challenged instruction was:

> The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.

Francis, 471 U.S. at 311. The Court held that the instruction violated due process:

> The federal constitutional question is whether a reasonable juror could have understood the two sentences as a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts.

* * *

> The court today holds that contradictory instructions as to intent--one of which imparts to the jury an unconstitutional understanding of the allocation of burdens of persuasion--create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner, unless other language in the charge explains the infirm language sufficiently to eliminate this possibility. If such a reasonable possibility of an unconstitutional understanding exists, "we have no way of knowing that [the defendant] was not convicted on the basis of the unconstitutional instruction."

Id. at 316, 322 n.8 (quoting *Sandstrom*).

B

When a defendant pleads not guilty and, in the alternative, not guilty by reason of insanity, California conducts a bifurcated trial.[2/] In the first phase, the defendant's guilt is determined without reference to his plea of insanity. If defendant is found guilty, the trial goes on to a second phase in which his legal sanity is determined. Petitioner in this case contended during the guilt phase that he did not have the requisite mental state for first degree murder. During the sanity phase, petitioner contended that he was insane.

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2. When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed.

Cal. Penal Code § 1026.

First degree murder is defined under California law as "murder"[3] that is a "willful, deliberate, and premeditated killing." Cal. Penal Code § 189. Sanity is defined using a modernized version of the *M'Naghten* Rule: a person is insane if he or she is "incapable of knowing or understanding the nature and quality of his or her act [or] of distinguishing right from wrong at the time of the commission of the offense. " Cal. Penal Code. § 25(b); see also *People v. Skinner*, 39 Cal. 3d 765, 768 (1985).

The problem in this case does not lie with California's bifurcated system under which guilt and sanity are determined in separate phases of the trial. Nor does it lie with California's legal definitions of first degree murder or sanity. Rather, the problem lies with what the jury was told to presume about petitioner's mental state.

At the conclusion of the guilt phase, the judge gave the following instruction:

> Evidence has been received regarding a mental disease or mental disorder of the defendant at the time of the crime in the Information. You may consider such evidence solely for the purpose of determining whether or not the defendant actually formed the mental state which is an element of the crime charged in the Information, and are [sic] found in the definitions of murder.
>
> If from all the evidence you determine to be credible you have a reasonable doubt whether the defendant formed any required mental state

---

3. Murder is "the unlawful killing of human being . . . with malice aforethought." Cal. Penal Code § 187. Malice aforethought is "a deliberate intention unlawfully to take away the life of a fellow creature." *Id.* § 188.

> or had the necessary specific intent, you must find that he did not have such mental state or specific intent.
>
> *At the time of the alleged offense charged in the Information, you were [sic] instructed to presume that the defendant was sane.*

(emphasis added).

[2] The first paragraph is closely patterned after California Jury Instructions -- Criminal (CALJIC) § 3.32. The second paragraph is a specific application of the general jury instruction on reasonable doubt. See *generally* CALJIC § 2.90. The italicized last paragraph is the instruction challenged in this case. It is an accurate technical statement of the law, comporting with California's system of bifurcated trials, but it is not a standard jury instruction in California.

[3] The California Court of Appeal in this case specifically noted that the challenged instruction is not a standard jury instruction. We would go further. Not only is it not a standard instruction, but an earlier version of this instruction was specifically disapproved for use in cases like the one now before us. In the 1970 edition of CALJIC, § 3.34 provided as follows:

> The intent with which an act is done is shown by the circumstances attending the act, the manner in which it is done, the means used, and the soundness of mind and discretion of the person committing the act.
>
> [For the purposes of the case on trial, you must assume that the defendant was of sound mind at the time of his alleged conduct which, it is charged, constituted the crime described in the information.]

A "Use Note" appended to § 3.34 warned against using the bracketed paragraph: "Do not give second paragraph in a specific intent crime if there is evidence of diminished capacity."

The California Supreme Court in *People v. Burton*, 6 Cal.3d 375 (1971), analyzed a still-earlier CALJIC instruction that had simultaneously instructed the jury to determine the defendant's intent and to presume that the defendant was sane. The court wrote, "There is certainly a potential conflict in [the earlier] instruction that could well mislead the jury." *Id.* at 390. The court then approved the newly adopted 1970 CALJIC § 3.34 and its appended Use Note: "We are satisfied that this is a correct and fully adequate way to handle the situation."
Id. at 391.

[4] The problem with the instruction given in this case is that it tells the jury to presume a mental condition that -- depending on its definition -- is crucial to the state's proof beyond a reasonable doubt of an essential element of the crime. Under California law, a criminal defendant is allowed to introduce evidence of the existence of a mental disease, defect, or disorder as a way of showing

that he did not have the specific intent for the crime.[4] In a first degree murder case, the evidence would be used to show that he did not willfully deliberate and premeditate the killing. If the jury is required to presume the non-existence of the very mental disease, defect, or disorder that prevented the defendant from forming the required mental state for first degree murder, that presumption impermissibly shifts the burden of proof for a crucial element of the case from the state to the defendant. Whether the jury was required to presume the nonexistence of a mental disease, defect, or disorder depends on the definition of sanity that a reasonable juror could have had in mind.

C

[5] The Supreme Court's source in *Sandstrom* for the lay definition of "presume" was the 1974 edition of Webster's New Collegiate Dictionary. Using the most recent edition of that dictionary, we find the following definitions of "sane": "1: proceeding from a sound mind: RATIONAL 2: mentally sound; *esp*: able to anticipate and

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4. Under current California law, evidence of mental disease, defect or disorder is not admissible to show diminished capacity per se, but it is admissible to show whether a particular defendant actually had the mens rea required for a specific intent crime:

> Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

Cal. Penal Code § 28(a).

appraise the effect of one's actions[.]" Merriam Webster's Collegiate Dictionary 1035 (1998). Under these definitions, the instruction "to presume that the defendant was sane" impermissibly relieves the state of its burden to prove beyond a reasonable doubt that defendant had the mental state necessary to commit first degree murder under California law.

[6] In order to convict a defendant of first degree murder, the state must prove beyond a reasonable doubt that the defendant was guilty of "willful, deliberate, and premeditated killing." Where, as here, evidence is introduced at trial that a defendant was suffering from a mental disease, defect, or disorder, the jury is entitled to consider evidence of such disease, defect, or disorder in determining whether the defendant actually had the mental state necessary for first degree murder. But if a jury is instructed that a defendant must be presumed "sane" -- that is, "rational" and "mentally sound," and "able to anticipate and appraise the effect of [his] actions," -- a reasonable juror could well conclude that he or she must presume that the defendant had no such mental disease, defect, or disorder. If a juror so concludes, he or she presumes a crucial element of the state's proof that the defendant was guilty of willfulness, premeditation, and deliberation.

[7] Under *Francis*, we do not consider a particular instruction in isolation, but rather consider "the potentially offending words . . . in the context of the charge as a whole." 471 U.S. at 315. Even interpreting "charge" broadly (probably more broadly than *Francis* intended) to include preliminary as well as concluding instructions, we believe that the instruction was constitutionally flawed.

[8] At the beginning of the trial, the judge instructed the jury as follows:

> At the conclusion of the testimony in the case in what's called the guilt phase, there will then be oral arguments by the attorneys where they will try to sum up and explain to you exactly what they think the evidence is proved. I will also give you a set of instructions at that time that include all of the instructions other than what are called the concluding instructions, which obviously means I conclude the trial with them after all the arguments are over. Then you will be asked to go out and deliberate on the issue of guilt or innocence. If you return a verdict in that particular case on that particular phase, that will determine where we go from there. And if we have a sanity phase, it is a little different as you heard. Because in the sanity phase the defendant has the burden of proof; and, therefore, he goes first rather than the People. And he presents his evidence. And then they present their evidence after he presents his evidence.

A short time later, the judge reiterated that the guilt phase would come first and the sanity phase second. At the end of the trial, as part of his instructions at the close of the evidence, the judge gave the challenged instruction. Nowhere in his preliminary or concluding instructions did the judge explain that the presumption of sanity was the analytical basis for the bifurcated trial; nowhere did he provide the *M'Naghten* definition of insanity that the jury was asked to presume; and nowhere did he warn the jury that "sane" was being used in something other than the conventional lay sense that the jurors were likely to have had in mind.

[9] We hold that the guilt phase instruction to presume the defendant was sane was a violation of the Due Process Clause of the Fourteenth Amendment. The California Court of Appeal's decision that there was no error was, in the words of AEDPA, "contrary to, or

involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Supreme Court wrote in *Francis*,

> Because a reasonable juror could have understood the challenged portions of the jury instruction in this case as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of *intent*, and because the charge read as a whole does not explain or cure the error, we hold that the jury charge does not comport with the requirements of the Due Process Clause.

471 U.S. at 325 (emphasis added). If the italicized word "intent" is changed to "mental state," this language captures our case precisely. AEDPA sets a high standard, but it is satisfied in this case.

We are reluctant to tell the California courts precisely what jury instruction we think they should use in a case such as this, for so long as California's jury instructions comply with the Due Process Clause of the Fourteenth Amendment, we have no authority to choose one instruction over another. As a logical matter, the trial court could have instructed the jury to presume that the defendant was sane; explained to the jury the precise relationship between the first and second phases of the trial; and explained the legal definition of sanity under *M'Naghten* that the jury is asked to presume. Perhaps because of the potential for jury confusion, however, California courts have not chosen to proceed this way. Even if it were our place to do so, we would not quarrel with that choice.

The simplest solution may also be the best solution. We would have found no due process violation in this case if the challenged instruction had simply been omitted. This

was the solution adopted for comparable cases in the 1970 edition of CALJIC § 3.34 and endorsed by the California Supreme Court in *People v. Burton*. We infer from the omission of the challenged instruction from the standard instructions in CALJIC that it is also California's solution under current law.

IV

[10] We next address whether the error was harmless. A constitutional error is harmless on federal habeas review of a state court conviction unless it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quotations and citations omitted). "[W]here a judge, in a habeas proceeding, applying this standard of harmless error, is in grave doubt as to the harmlessness of an error, the habeas petitioner must win." *California v. Roy*, 519 U.S. 2, 5 (1996) (internal quotation marks and citations omitted); see also *Bains v. Cambra*, 204 F.3d 964, 977 (9th Cir. 2000).

[11] Petitioner's mental state was the primary issue throughout the guilt phase of the trial. Petitioner put on a great deal of evidence of his mental state, including extensive expert psychological testimony. Based on this evidence, he argued that he did not have the mental state necessary for first degree murder. Any presumption that would have relieved the state of its burden to prove a crucial element of such mental state necessarily played an important role in the jury's ultimate determination of guilt.

Aware of the importance of petitioner's evidence concerning his mental state, and equally aware of the importance of the presumption of sanity, the prosecutor in closing argument repeatedly relied on the presumption to tell the jury that petitioner's evidence was legally irrelevant and must be disregarded. The prosecutor argued:

> Mr. Patterson is presumed to be sane. And that [,] in this stage of the proceeding[,] is the law .... [W]hen Mr. Patterson called the psychiatrists[,] he called at the guilt phase and in a sense has put the cart before the horse. Mr. Patterson has attempted to show that because of his mental condition, he didn't form an intent, the intent required or [sic] premeditate or deliberate. . . . The basis of opinions -- and you're going to be instructed to basically disregard any opinion that goes to the ultimate fact. You heard-- *the instruction says any opinion from a psychiatrist that goes to intent, premeditation or the ultimate fact[,] disregard. That's the law. At this stage of the proceeding you are to do that. You are to presume he's sane. You are not to accept that opinion.*

(emphasis added). The prosecutor continued:

> Those are the elements. Unlawful killing of a human being with malice aforethought and for first degree murder willful, deliberate, premeditated. We talked about motive not being an element. But the motive was provided for us simply by Mr. Patterson. *He's presumed to be sane in this stage of the proceeding. He was sane.*

(emphasis added).

[12] After the jury returned a verdict of guilty, that same jury was asked to decide whether petitioner was sane under the *M'Naghten* definition of sanity. The jury hung on that question, and a second jury was empaneled to determine whether petitioner was sane. Because the *M'Naghten* definition of sanity is harder to satisfy than the lay definition, it is difficult to escape the conclusion that a jury unwilling to find unanimously that petitioner was sane under *M'Naghten* would also have been unwilling, if

properly instructed, to find that petitioner had the mental state necessary for first degree murder.

[13] We therefore have "grave doubt" about the harmlessness of the erroneous instruction, *Roy*, 519 U.S. at 5, and believe that it "had a substantial and injurious effect or influence in determining the jury's verdict," *Brecht*, 507 U.S. at 637.

V

We conclude that the challenged jury instruction violated the Due Process Clause of the Fourteenth Amendment and that the error was not harmless. We therefore REVERSE the district court's denial of Patterson's habeas petition, and REMAND the case to the district court with instructions to grant the writ, unless the State of California grants Patterson a new trial within a reasonable period to be set by the district court.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MITCHELL ALFRED PATTERSON Petitioner-Appellant, vs. JAMES GOMEZ, Respondent.	No. 99-15530 D.C. No. CV-96-01546 DFL **ORDER** FILED: Sept. 11, 2000

Before: W. FLETCHER, Circuit Judge

Upon due consideration of Appellee's motion for stay of the mandate of this Court in the above cause pending the filing of a petition for writ of certiorari,

IT IS ORDERED that the motion for stay of mandate be **GRANTED.**[1]

1. In the event that the petition for writ of certiorari is timely filed, "the stay shall continue until final disposition by the Supreme Court." Fed.R.App.P.41(d)(2)(B).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MITCHELL ALFRED PATTERSON Petitioner, vs. JAMES GOMEZ, Respondent.	No. CIV S-96-1546 DFL GGH P **ORDER** FILED: Feb. 25, 1999

Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of this court's December 17, 1998, denial of his application for a writ of habeas corpus. Before petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The court must either issue a certificate of appealability indicating which issues satisfy the required showing or must state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b).

For the reasons set forth in the magistrate judge's May 22, 1998, findings and recommendations, petitioner has not made a substantial showing of the denial of a constitutional right on his claim of insufficient evidence. However, the court grants a certificate of

appealability on petitioner's claim that due process was violated by the trial court's instruction that defendant was presumed to be sane.

IT IS SO ORDERED.

DATED: 2/24/1999

David F. Levi
U.S. DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MITCHELL ALFRED PATTERSON Petitioner, vs. JAMES GOMEZ, Respondent.	No. CIV S-96-1546 DFL GGH P **ORDER** FILED: Dec. 17, 1998

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On May 22, 1998, the magistrate judge filed findings and recommendations herein which were served on petitioner and which contained notice to petitioner that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72304, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed May 22, 1998, are adopted in full; and

2. Petitioner's application for a writ of habeas corpus is denied.

DATED: December 16, 1998.

David F. Levi
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MITCHELL ALFRED PATTERSON	)	
Petitioner,	)	No. CIV S-96-1546 DFL GGH P
vs.	)	
JAMES GOMEZ,	)	**FINDINGS AND RECOMMENDATIONS**
Respondent.	)	FILED: May 22, 1998

1. Introduction

Petitioner is a state prisoner represented by counsel and proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1994 conviction for first degree murder on March 31, 1993 (Penal Code § 187(a)), for carrying his ten year old daughter onto a freeway and throwing her in front of a semi truck.

After separate guilt and sanity phases, petitioner was sentenced to 25 years to life.
Exh. D at 3.

In the instant petition, petitioner raises two grounds for relief: (1) that petitioner's due process rights under the Fourteenth Amendment were violated when the trial court instructed the jury during the guilt phase that petitioner was presumed to be sane, thereby relieving the prosecution of the burden of proving premeditation and

deliberation, and nullifying defense evidence that petitioner had a severe mental disorder; and (2) that there was insufficient evidence of premeditation and deliberation to sustain the verdict.
Petition, filed August 28, 1996, at 4-5.

After carefully reviewing the record, the court has determined that the petition should be denied in this tragic case.

II. Background[1/]

> [Petitioner] suffers from depression and was hospitalized in 1989 for attempting suicide. Although prescribed psychotropic medication, he discontinued its use.
>
> On March 30, 1993, [petitioner] had not slept in three days and was experiencing serious marital and financial problems. On that day, [petitioner], his wife, and their three children arrived at the Willits home of petitioner's in-laws. He later left with his 10-year-old daughter Adrianna to buy ice cream. As they were leaving, he told his mother-in-law that his wife "will be happy here. This is where she's always wanted to be." When the two did not return, petitioner's wife called the California Highway Patrol.
>
> [Petitioner] drove Adrianna to San Francisco, where he drove back and forth across the Golden Gate Bridge at least twice. The following morning, witnesses saw [petitioner's] pickup truck parked on Interstate 80 near Floriston, roughly 10 miles east of Truckee.
>
> At approximately 11:30 a.m. on March 31, 1993, [petitioner] telephoned his wife from a passing motorist's car phone, and asked her to send his sister to pick him up. [Petitioner's] sister

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1. The background facts are quoted from the Court of Appeals Opinion, Exhibit D to Respondent's Answer.

departed to pick up [petitioner] and Adrianna between noon and 1 p.m.

Several motorists testified to seeing [petitioner] and a young girl walking along Interstate 80 between 11:30 a.m. and 1:25 p.m. Between 1:20 and 1:25 p.m., as [petitioner] and Adrianna remained alongside the freeway eating a sandwich given them by a passing motorist, a semi truck approached. When the truck was within 100 feet, [petitioner] grabbed Adrianna and ran onto the freeway. The driver swerved into another lane, but petitioner continued, and with a "determined" expression, lunged at the truck. Adrianna was killed; both [petitioner's] hands were fractured.

[Petitioner] offered inconsistent explanations for his behavior, first contending it was an "accident" and subsequently asserting he was mentally ill, was hallucinating, and believed he had to kill himself and Adrianna to avoid a bizarre and tortured death.

[Petitioner] pled not guilty and not guilty by reason of insanity. At the conclusion of the guilt phase, the jury found [petitioner] guilty of first degree murder. In the sanity phase, the first jury deadlocked and the court declared a mistrial. After retrial, the jury found [petitioner] sane. The court imposed a sentence of 25 years to life.

III. Standard of Review

The Antiterrorism and Effective Death Penalty Act (AEDPA) applies to this petition which was filed after the effective date of the AEDPA. *Neeley v. Nagle*, 138 F.3d 917 (11th Cir. 1998). The so called "presumption of correctness" of state court legal rulings aspect of the habeas amendments comes into play at this point, and as discussed below, the AEDPA amendments call for a significantly different analysis in this case from that under

the prior law. The court will expend some time discussing it.

Section 2254(d) reads as follows:

> (d) an application for a writ of habeas corpus on behalf of a person in custody shall not be granted with respect to any claim *that was adjudicated on the merits in State court proceedings* unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. (emphasis added)

Except for a concise recitation of the statutory provisions found in *Jeffries v. Wood*, 114 F.3d 1484, 1498 (9th Cir. 1997), the Ninth Circuit has not discussed the AEDPA amendments with respect to state court legal rulings, both pure law questions and issues of mixed fact and law. The Circuits that have had occasion to discuss it thus far have split on the appropriate analytical methodology. The First Circuit does not break down the issue by whether it is one of mixed fact or pure law, but rather asks two questions: is there a Supreme Court case on point, and if not, whether the state court ruling involves an unreasonable application of established Supreme Court law. *Martin v. Bissonette*, 1997 WL 280602

(May 1997) *opinion withdrawn on other grounds and new opinion issued*, 118 F.3d 871 (1st Cir. 1997). The Fifth and Seventh Circuits first inquire whether the issue involved is one of pure law, a mixed fact and law question, or one of pure fact. If the question is one of pure law, the decision of the state court may only be overturned if it is contrary to established Supreme Court authority. If the question is mixed law and fact, the state determination is upheld unless it constituted an unreasonable application of Supreme Court authority. *Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996), *rvsd on other grounds,* 117 S. Ct. 2059 (1997); *Drinkard v. Johnson*, 97 F.3d 751, 767-68 (5th Cir. 1996). An application of law to facts is "unreasonable," "only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect." *Id.* At 769. However, the differences in approach may be more semantical than substantive in that the application of either will generally lead to the same result. *Harpster v. State of Ohio*, 128 F.3d 322, 327 (6th Cir. 1997). *See also Neeley v. Nagle, supra.*

The question left unanswered by the above cases, however, is to what extent Circuit authority is pertinent that explicates the controlling Supreme Court decisions. Of course, if the Circuit has created a new rule, none would find that such a rule qualifies as Supreme Court authority. However, when the Circuit applies a Supreme Court ruling to an analogous or slightly different factual setting, is the Circuit holding in the analogous situation one that should be substituted for a direct holding of the Supreme Court? Given the express words of the statute, this court finds that Circuit authority is persuasive, but not binding. If the Circuits explicate the federal issue in question in the same manner, and such explication is based on Supreme Court authority, the lower court should follow the unanimous opinions of the Circuits.[2/] If

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2. If, however, the Ninth Circuit, applying AEDPA standards, issued an opinion in a substantively identical case holding that the state courts had been unreasonable in their application of Supreme

however, the Circuits are split, one could not say that reasonable jurists are all of one viewpoint.

IV. Discussion

A. Jury Instruction Regarding Presumption that Petitioner was Sane

Petitioner's first claim is that the trial court erroneously instructed the jury during the guilt phase that petitioner was presumed to be of sound mind, thus nullifying the defense case that petitioner had a severe mental disorder. Petitioner further argues that this instruction relieved the prosecution of its burden to demonstrate that petitioner premeditated and deliberated the death of his daughter.

The portion of the instruction objected to by petitioner is taken from California Penal Code § 1026(a) and reads: "At the time of the alleged offense charged in the Information, you were (sic) instructed to presume that the defendant was sane." RT 1670.[3]

The California Court of Appeals based its denial of this claim on the following reasoning:

> "[I]nstructions must be viewed as a whole and in light of other instructions given by the court to the jury."[4] *(People v. Russell* (1971) 22

Court precedent, such a holding would be binding on the Ninth Circuit district courts.

3. The actual code section states in part:

(a) When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed.

4. At oral argument, defendant cited *Francis v. Franklin* (1985) 471 U.S. 307 [85 L.Ed.2d 344], which concerned jury instructions that

Ca1.App.3d 330, 336.) Immediately before the challenged instruction, the court instructed the jury: "Evidence has been received regarding a mental disease or mental disorder of the defendant at the time of the crime in the information. You may consider such evidence solely for the purpose of determining whether or not the defendant actually formed the mental state or specific intent which is an element of the crime charged in the information, and are found in the definitions of murder. [¶] If from all the evidence you determine to be credible you have a reasonable doubt whether the defendant formed any required mental state or had the necessary specific intent, you must find that he did not have such mental state or specific intent." Accordingly, the combination of the two instructions set forth the correct balance, and did not tell the jury to ignore the mental state evidence.

At oral argument, echoing a weak statement from his opening brief, defendant argued it was error to give this instruction because it precluded the jury from considering the evidence of his mental instability in making its guilt phase determination. Defendant cites no authority for this proposition, and his assertion of error is unsupported by the record.

Defendant pled not guilty by reason of insanity, and accordingly his trial was bifurcated. (See *People v. Phillips* (1979) 90 Cal.App.3d 356, 362; *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 542.) It is undisputed that the trial court

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effectively relieved the State of its burden of proof on criminal intent. As explained above, the trial court expressly instructed the jury it could consider evidence of defendant's mental disability in determining whether he formed "the mental state or specific intent" necessary for murder. We find *Francis* inapposite.

> correctly advised the jurors (1) that the case would be tried in two parts, a guilt phase and a sanity phase. By giving the challenged latter instruction, the trial court merely told the jury it could not consider in the guilt phase whether defendant was insane. (See *People v. Smith* (1973) 33 Cal.App.3d 51, 75, overruled on other grounds, *People v. Wetmore* (1978) 22 Ca1.3d 318, 324.)
>
> Evidence of defendant's mental condition was fully developed and argued by both sides, and the trial court never told the jury it could not consider evidence of defendant's mental condition as it bore on issues pertinent to guilt. The trial court fully instructed the jury relative to its duty to consider the evidence of defendant's mental condition and the prosecution's burden to establish defendant's guilt beyond a reasonable doubt. Defendant's opening brief asserts, "[b]y instructing the jury that the defendant is presumed to be sane, the trial court in effect told the jury that evidence raising a doubt of appellant's mental state at the time of the incident was not relevant or worthy of belief." However, something more is required than defendant's mere assertion the instruction had this effect or somehow affected the burden of proof. We note trial counsel did not take issue with the challenged instruction. This is an important point because trial counsel was better positioned to assess and pursue the matter.

Exh. D at 10-12.

In addition to instructing the jury that it could consider evidence of defendant's mental disorder in determining his intent, as well as to presume defendant was sane, the trial court immediately followed these instructions with the definitions of murder and the intent

level that must be proved, including malice aforethought and willful deliberation and premeditation. *See* RT 1670-72. The court also described the different degrees of homicide and instructed that in order to find first degree murder, the jury must find that malice aforethought and deliberation and premeditation were proved beyond a reasonable doubt. RT 1670, 1672, 1674. The court additionally instructed the jury that petitioner was presumed innocent until proven guilty beyond a reasonable doubt by the People who had the burden of proof. RT 1668.

Petitioner does not assist his case in essentially arguing that the AEDPA changed nothing with respect to the standard of review of a state court's legal rulings, and that the federal court should review the legal issue de novo. As set forth above, in order to obtain relief here, petitioner would have to show that the state court's ruling was not debatable among jurists of reason in terms of application of Supreme Court authority pertinent to similar due process arguments. This petitioner has not done. Indeed, even the pre-AEDPA law applicable to very similar situations held that an instruction as to the presumption of sanity did not violate due process. *McKenzie v. Risley*, 842 F.2d 1525, 1534-1535 (9th Cir. 1988) (en banc) (exhaustively reviewing Supreme Court "burden shifting" cases cited by petitioner herein throughout opinion, and holding that a presumption of sanity instruction did not confuse the jury or raise a presumption/burden shifting error on mens rea issue); *see also Knaubert v. Goldsmith*, 791 F.2d 722 (9th Cir. 1986) (presumption of sanity instruction in light of all the instructions did not taint sanity determination). Because the *McKenzie* case stands for the proposition that reasonable jurists can interpret Supreme Court authority as did the California court, petitioner's presumption/shifting burden of proof claim herein fails.

The key distinction between this case, as exemplified by *McKenzie*, and the Supreme Court case of *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965 (1985),

upon which petitioner so heavily relies is that in *Francis* the jury was instructed that the fact of a sound mind gave rise to a presumption on the intent issue, id. at 315, 1971-1972. No such presumption as to the mens rea issue was asserted in the instant case. As in *McKenzie*, the jury herein was only instructed that petitioner's sanity was presumed-there was no instruction link-up (as in *Francis*) between his sanity and the mens rea issues.

B. Sufficiency of the Evidence

Petitioner's second claim is that there was insufficient evidence of premeditation to support a conviction for first degree murder. When a challenge is brought alleging insufficient evidence, federal habeas corpus relief is available only if it is found that upon the record evidence adduced at trial, viewed in the light most favorable to the prosecution, no rational trier of fact could have found proof of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U. S. 307, 324 (1979). Under *Jackson*, this standard must be applied with reference to the substantive elements of the criminal offense as defined by state law. *Id.* at 324 n.16. Moreover, the court must review the entire record when the sufficiency of the evidence is challenged on habeas. *Adamson v. Ricketts*, 758 F.2d 441, 448 n. 11 (9th Cir. 1985), *vacated on other grounds*, 789 F.2d 722 (9th Cir. 1986) (en banc), *rev'd*, 483 U.S. 1 (1987).

It is the province of the jury to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. 307, 319. "The question is not whether we are personally convinced beyond a reasonable doubt. It is whether rational jurors could reach the conclusion that these jurors reached." *Roehler v. Borg*, 945 F.2d 303, 306 (9th Cir. 1991). Under *Jackson*, the federal habeas court determines sufficiency of the evidence in reference to the substantive elements of the criminal offense as defined by state law. *Jackson*, 443 U.S. 307, 324 n.16.

Under California law, first degree murder is defined as the willful, deliberate, and premeditated killing of a human being with malice aforethought. Cal. Penal Code §§ 187(a), 189. "'The word "deliberate" means formed or arrived or determined upon as the result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.'" *People v. Perez*, 2 Cal. 4th 1117, 1123 (1992) (quoting CALJIC 8.20). The intent to kill must have been "formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation." *Id.* This intent cannot be "a mere unconsidered and rash impulse"; rather, "the slayer must weigh and consider the question of killing and the reasons for and against such choice and, having in mind the consequences, he decides to and does kill." (*Id.*)

At least three types of evidence support a finding of premeditation and deliberation: "(1) planning activity; (2) motive; and (3) manner of killing." *Id.* at 1125 (citing *People v. Anderson*, 70 Cal. 2d 15, 27 (1968)). In *Anderson*, the California Supreme Court stated: "Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." *People v. Anderson*, 70 Cal. 3d at 27.

In the instant case, there was ample evidence of planning, from the time petitioner left his in-laws' home in Willits. Petitioner's mother-in-law testified that immediately before leaving the house with Adrianna, he told her, "Sheila [petitioner's wife] will be happy here. This is where she's always wanted to be." RT 123. Petitioner stated to Dr. Lyons, a psychiatrist for the prosecution, that Adrianna wanted to leave her grandparents' house with petitioner, and "she did not know that she would not be coming back. I told her I would take her to see the Golden Gate Bridge." RT 1453. Petitioner next drove to the Golden Gate Bridge, and went across it a few times. RT. 167. These statements and

acts indicate petitioner's planning and reflection of his intended crime.

It is true that petitioner also stated to Dr. Lyons that he knew it was wrong but "that is beside the point because I was under delusions at the time. And I felt I had to get out of there and go to a less populated area where it was more peaceful and safer. I felt it was saving my daughter." *Id.* These statements could possibly be interpreted as indicating either mental problems, or the lack of intent to kill, but they could likewise be interpreted as "saving" Adrianna from this world by killing her, and apparently were so interpreted by the jury.

This latter inference was bolstered by petitioners' statements to Dr. Winer, "that he thought that killing both his daughter and himself would be far better than what people had in store for them." RT 617-18. Although petitioner also told this defense psychiatrist that he saw people being burned to death on the freeway, indicating delusions and psychosis; RT 618, 624; the jury rationally could have chosen to draw the inference of intent.

Numerous witnesses who interacted with petitioner on the freeway and after the event that day testified that his demeanor seemed normal and rational, and that they did not notice anything unusual. See RT 131 (Austin Hodges - petitioner's father-in-law), RT 201-02 (Eugene Sweetland, Jr., freeway witness), RT 237-40 (Robert Riley - CHP officer on freeway), RT 252 (Ty Brown - CHP officer on freeway), RT 284 (Judy Tye - freeway witness), RT 300 (Brad Deboer - service station owner to whom petitioner attempted to sell his truck on March 31, I 993), RT 328 (Robert Carpenter - CHP officer), RT 388-89 (Gary Botto - paramedic fire captain), RT 400 (Guy Mohun - paramedic), RT 458 (Elizabeth Rehkop - deputy sheriff), RT 602 (Don Bossingham - CHP captain commander), RT 926 (Dr. Bittle - court appointed psychiatrist), and RT 1477 (Dr. Lyons - prosecution psychiatrist).

The evidence also indicated that petitioner was on the side of the freeway for a couple of hours,

apparently deciding whether to commit suicide and take Adrianna with him. RT 952. This length of time is persuasive evidence of deliberation and premeditation. The act which followed was thus less likely the result of an impulsive, unplanned or rash decision.

Dr. Bittle, a court appointed psychiatrist, testified that in his opinion petitioner was actively suicidal at this time. *Id.* This information was considered by the jury who found premeditation despite this and other similar testimony.

Other evidence of planning include statements to witnesses on the freeway that he wanted to do something about his problems and stated that he "thought about it, but [he] would never do it or could never do it." RT 390. The witness was not allowed to clarify what petitioner meant by this statement because it called for speculation, but the jury could infer, based on petitioner's prior statement to this witness regarding his family problems, that petitioner was referring to suicide. RT 389.

Also indicative of petitioner's intent was the testimony of Mr. Preeble, the truck driver whose truck hit petitioner and his daughter. He stated that petitioner looked at him as he was approaching on the freeway, and when the truck was about 100 feet away, petitioner picked up the girl and ran into the highway. RT 260. He described petitioner's approach to the truck as "a dead run just right straight for my truck," with a "very serious . . . look of determination." *Id.* The trucker continued by stating that "it appeared to [him] that [petitioner] was going to throw the girl out in front of my truck just the way he had her." RT 261.

Also introduced into evidence was a tape recording of petitioner's interview with law enforcement, dated April 1, 1993, the day after the incident, in which petitioner stated, "I think I stopped thinking about it and just did it." RT 971. Dr. Bittle testified that in his opinion, this statement "implies that [petitioner] had been contemplating and considering this behavior which and [sic] resulted in this tragedy and that there was some

control over this behavior in this decision to initiate this action." RT 971. Dr. Lyons testified that petitioner told him: "I tried to commit suicide with my daughter in my arms. I thought someone was out to get us real bad. I thought it would be quicker and easier than what was going to happen . . . I knew it was not going to be something simple by being shot. Maybe it would be torture." RT 1453. This comment indicates that petitioner had considered the method of killing in advance. The opinion of Dr. MacQuarrie, a physician and director of emergency services at Tahoe Forest Hospital who examined petitioner after he was admitted to the hospital following the event, was further evidence of intent. This doctor testified that in his opinion petitioner was not only not delusional when examined by him, but appeared to be lying about the event and kept changing his version of the story. RT 97, 100.

Although petitioner had problems which could have led to his mental deterioration, these problems also provided a motive for his plan to commit a "murder-suicide." There was evidence of financial problems, including lost work due to a back injury, being laid off within a couple of years later, and loss of his own carpet cleaning business. RT 143, 144, 145. These problems caused petitioner and his family to get four months behind on rent. RT 146. Petitioner also lost his mother, brother and best friend to death at about the same time. RT 147. Additionally, petitioner had marital problems. RT 154, 162, 175. Petitioner also told one freeway witness, Judy Tye, that his daughter "hadn't had two minutes of happiness in her life and that he wanted to get her back to her sister's." RT 278. Although this statement might indicate a lack of intent to kill his daughter, it could also point to petitioner's intent to save his daughter from the miserable remainder of her life by killing her. A rational jury could have made the determination either way.

Petitioner stresses his argument that he was suicidal and that due to his mental illness he could not form the requisite state of mind which required careful

thought and weighing of the consequences of the act of killing. The jury had petitioner's evidence of his mental state and chose instead to believe the prosecution's version of which there was support in the record. No less than five psychiatrists testified, including two for the prosecution and two for the defense, as well as a court appointed psychiatrist. There was evidence in support of each party's position as to petitioner's mental state. In essence, the jury had to choose from two scenarios: (1) petitioner's disordered state of mind precluded premeditation and deliberation; and (2) petitioner was distraught, and wrestled with his conscience, but ultimately decided to kill his daughter. The fact that prior to the killing petitioner was torn between his irrational desire to end his daughter's life and his knowledge that this was wrong, does not mean he did not deliberate his actions, or have the capacity to do so.

The fact that petitioner can construct from the evidence alternative, reasonable scenarios at odds with the jury's verdict, does not mean that the evidence was insufficient, i.e., that no reasonable jury could have found the conviction scenario beyond a reasonable doubt.

> In reviewing the sufficiency of the evidence supporting a conviction, we search the record to determine "whether a reasonable jury, after viewing the evidence in the light most favorable to the government, could have found the defendants guilty beyond a reasonable doubt of each essential element of the crime charged." *United States v. Douglass*, 780 F.2d 1472, 1476 (9th Cir.1986). *The relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but whether the jury could reasonably arrive at its verdict. United States v. Fleishman*, 684 F.2d 1329, 1340 (9th Cir.), cert. denied, 459 U.S. 1044, 103 S. Ct. 464, 74 L.Ed.2d 614 (1982); *United States v. Federico*, 658 F.2d 1337, 1343 (9th Cir.1981), overruled on other grounds, *United States v. De*

Bright, 730 F.2d 1255, 1259 (9th Cir.1984) (en banc).

United States v. Mares, 940 F.2d 455, 458 (9th Cir. 1991) (emphasis added).

Returning to the standard of review here, the California appellate court did not unreasonably apply Supreme Court precedent on the issue of sufficiency of the evidence. Petitioner's sufficiency of the evidence claim should be denied.

IV. CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: May 22, 1998.

GREGORY G. HOLLOWS
U.S. MAGISTRATE JUDGE

APPENDIX F

Third Appellate District No. C019177
S050510

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

MITCHELL ALFRED PATTERSON, Appellant

Appellant's petition for review DENIED.

FILED: Feb. 14, 1996

LUCAS
Chief Justice

APPENDIX G

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

THE PEOPLE Plaintiff and Respondent, v. MITCHELL ALFRED PATTERSON, Defendant and Appellant.	)	C019177 (Super. Ct. No. 49140) FILED: Nov. 6, 1995

A jury convicted defendant of first degree murder after he carried his 10-year-old daughter onto Interstate 80 and threw her in front of a semi truck. On appeal, defendant raises issues involving the sufficiency of the evidence of premeditation and deliberation, the restriction of expert testimony, and instructional error. We affirm.

FACTS

Defendant suffers from depression and was hospitalized in 1989 for attempting suicide. Although prescribed psychotropic medication, he discontinued its use.

On March 30, 1993, defendant had not slept in three days and was experiencing serious marital and financial problems. On that day, defendant, his wife, and their three children arrived at the Willits home of defendant's in-laws. He later left with his 10-year-old daughter Adrianna to buy ice cream. As they were leaving, he told his mother-in-law that his wife "will be happy here. This is where she's always wanted to be." When the two did not return, defendant's wife called the California Highway Patrol.

Defendant drove Adrianna to San Francisco, where he drove back and forth across the Golden Gate Bridge at least twice. The following morning, witnesses saw defendant's pickup truck parked on Interstate 80 near Floriston, roughly 10 miles east of Truckee.

At approximately 11:30 a.m. on March 31, 1993, defendant telephoned his wife from a passing motorist's car phone, and asked her to send his sister to pick him up. Defendant's sister departed to pick up defendant and Adrianna between noon and 1 p.m.

Several motorists testified to seeing defendant and a young girl walking along Interstate 80 between 11:30 a.m. and 1:25 p.m. Between 1:20 and 1:25 p.m., as defendant and Adrianna remained alongside the freeway eating a sandwich given them by a passing motorist, a semi truck approached. When the truck was within 100 feet, defendant grabbed Adrianna and ran onto the freeway. The driver swerved into another lane, but defendant continued, and with a "determined" expression, lunged at the truck. Adrianna was killed; both defendant's hands were fractured.

Defendant offered inconsistent explanations for his behavior, first contending it was an "accident" and

subsequently asserting he was mentally ill, was hallucinating, and believed he had to kill himself and Adrianna to avoid a bizarre and tortured death.

Defendant pled not guilty and not guilty by reason of insanity. At the conclusion of the guilt phase, the jury found defendant guilty of first degree murder. In the sanity phase, the first jury deadlocked and the court declared a mistrial. After retrial, the jury found defendant sane. The court imposed a sentence of 25 years to life.

DISCUSSION

I

Sufficiency of the Evidence

Defendant first argues there was insufficient evidence of premeditation and deliberation to support his conviction for first degree murder in the guilt phase. We disagree.

"Settled principles of appellate review require us to review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt. [Citations.]" *(People v. Perez* (1992) 2 Cal. 4th 1117, 1124.)

Defense counsel argues defendant "loved and cared for his daughter" and "[o]n the day of Adrianna's death [defendant] suddenly and inexplicably grabbed his daughter and rushed in front of an eighteen-wheel semi truck and trailer." However, two psychiatrists testified "it is becoming more common . . . that individuals who follow through with the act of suicide take with them some significant other love object . . . ." From the evidence presented, the jury reasonably could have inferred defendant planned to kill Adrianna as part of his own suicide and had considered this outcome before leaving the home of his parents-in-law, as indicated by his parting

comment to his mother-in-law. Depressed over serious marital and financial problems and not having slept in several days, defendant drove Adrianna to the Golden Gate Bridge, a "magnet" for suicidal individuals. Defendant was "probably suicidal" at that point and crossed the bridge at least twice. Defendant then left the Bay Area and eventually parked along Interstate 80 near Floriston.

Evidence also supports the conclusion that after lingering alongside the freeway for several hours, "actively suicidal," and knowing his sister was due to arrive momentarily, defendant finally took definitive action upon seeing the truck. He carried out his calculated decision to kill Adrianna by picking her up, running directly at the oncoming truck only 100 feet away with a "determined" expression on his face, and lunging at the truck when the driver swerved into another lane. Defendant himself testified he had been thinking about killing himself and Adrianna, acknowledged he had seen the truck coming and ran out into the road to kill himself, and testified he had known they both would be killed if he got in front of the truck. After the accident, defendant told police he "quit thinking about it and . . . just did it."

"[P]remeditation [and deliberation] can occur in a brief period of time. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment maybe arrived at quickly . . . . [Citations.]" (*People v. Perez, supra*, 2 Cal. 4th at p. 1127, internal quotation marks omitted.)

Substantial evidence supports the jury's finding of premeditation and deliberation.

II

Expert Testimony

Defendant argues "the trial court erred by restricting defense expert testimony on the question of whether [he] was thinking logically or was in touch with reality on the day of the offense." (Capitalization omitted.) (AOB 43)

Penal Code section 29 provides: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."

Penal Code section 29 "does not forbid an expert from stating his opinion about the accused's mental state . . . . Section 29 preclude [s an expert] only from testifying whether defendant had one of the mental states required for the offenses--for example, malice aforethought. That ultimate determination must be made by the trier of fact." (People v. McCowan (1986) 182 Cal.App.3d 1, 14.) Section 29 permits a defendant "to introduce psychiatric testimony regarding his mental condition at the time of the offenses," but precludes him from "asking his psychiatrist whether the requisite mental state existed." *(Ibid.)*

Defendant asserts the trial court "carried the Section 29 ban beyond the mental state elements of the offense, and prohibited evidence which could have undermined a verdict of guilt on the elements of malice and premeditation. During the presentation of the testimony of defense witness Melvin Winer, M.D., counsel sought to establish that appellant lacked insight and was not aware of his mental illness at the time of Adrianna's death." The record does not support defendant's

contention. Although the trial court sustained several objections to the witness's testimony, the transcript reflects that the witness did testify as to this very point. Moreover, an exchange between the trial judge and counsel outside the jury's presence reflects the judge's comprehension of this issue.

In response to questions from defense counsel, Dr. Winer testified:

"Q In your experience as a psychiatrist is it unusual for somebody suffering from a mental illness to be unaware of the fact that they're suffering from a mental illness?

"A Most individuals are unaware that they are suffering from mental illness.

"Q Is there a psychiatric term for that sort of state?

"A Lack of insight.

". . . . . .

"Q With specific reference to [defendant], after talking to him, after reviewing the records that were provided you and talking to relatives, do you have an opinion as to whether or not he understood that he had a mental illness on March 31st, 1993?

"A No, I don't.

". . . . . .

"Q Do you have an opinion as to whether on March 31st, 1993 [defendant] was in touch with reality?[1] . . .

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1. The prosecutor objected to this question, but the trial judge

"A No, he was not."

Due to the frequency of the prosecutor's objections, the trial judge asked the jury to wait in the hallway and discussed the ramifications of section 29 outside the jury's presence. The trial judge observed: "[F]rom what I understand, the expert can be asked questions about the nature and extent of the defendant's mental disease or defect. And from that defense counsel may argue the effect of that mental disease or defect on the question of whether or not the defendant actually had certain mental states. What the defendant may not ask the expert is [sic] questions as to whether or not the defendant actually had those mental states or lacked the capacity to form those mental states . . . ."

The judge continued: "[Dr. Winer has] already testified that in his opinion there were hallucinations. He's already testified in his opinion I think there were some operative delusions on the day of the incident. He's testified to some of the characteristics of his diagnosis . . . ."

After a brief recess, the judge cited additional case law and stated: "Clearly it would not be inappropriate to ask the doctor even under Section 29 if the diagnosed mental disorder had a major impact or a significant impact on his mental process on the day of the incident . . . . [¶] . . . I'm going to allow what the case law has previously allowed as meeting the due process standards which is testimony concerning the impact of the disorder on the defendant's mental processes at the time of the incident and testimony concerning how in this witness's opinion how he was thinking at the time of the incident as affected by the disorder . . . ."

When proceedings before the jury resumed, Dr. Winer diagnosed defendant as having a bipolar disorder with psychotic features and stated he believed

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never ruled on the objection. Accordingly, Dr. Winer's answer stood.

defendant was suffering from a mental illness at the time of the incident. Defense counsel asked Dr. Winer the effect of a bipolar disorder upon an individual's conduct and thought processes, and Dr. Winer testified "[defendant's] mind was overwhelmed with paranoid delusions. His mind was overwhelmed with delusions that he was going to be annihilated." Dr. Winer also testified such mental illness often is not noticeable to a third party because the patient can hide his psychotic fears.

Defendant claims the trial court "was unwilling to permit testimony on subjects such as whether the defendant was acting rationally . . . . When the jury returned Dr. Winer continued to testify, but no further questions were asked as to whether [defendant] possessed insight into his own mental condition."

The trial court permitted expert testimony as to the fact of defendant's mental illness and defendant's hallucinations and delusions. Dr. Winer had already testified he had no opinion with regard to whether defendant was aware of his own mental illness. We find no error.

III

Jury Instructions

Defendant raises three contentions of instructional error which we address in turn.

A. Presumption of Sanity

At the guilt phase of the trial, the court instructed the jury that a defendant is presumed sane. (See Pen. Code, § 1026, subd. (a).) Defendant challenges this instruction, noting no CALJIC instruction exists for this proposition and asserting the instruction undermined his effort to raise a reasonable doubt as to his mental state. The challenge is meritless.

The challenged instruction reads: "At the time of the alleged offense charged in the information, you are instructed to presume the defendant was sane." Penal Code section 1026 provides in pertinent part: "(a) When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed."

"[I]nstructions must be viewed as a whole and in light of other instructions given by the court to the jury."[2] (*People v. Russell* (1971) 22 Cal.App.3d 330, 336.) Immediately before the challenged instruction, the court instructed the jury: "Evidence has been received regarding a mental disease or mental disorder of the defendant at the time of the crime in the information. You may consider such evidence solely for the purpose of determining whether or not the defendant actually formed the mental state or specific intent which is an element of the crime charged in the information, and are found in the definitions of murder. [¶] If from all of the evidence you determine to be credible you have a reasonable doubt whether the defendant formed any required mental state or had the necessary specific intent, you must find that he did not have such mental state or specific intent." Accordingly, the combination of the two instructions set forth the correct balance, and did not tell the jury to ignore the mental state evidence.

At oral argument, echoing a weak statement from his opening brief, defendant argued it was error to

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2. At oral argument, defendant cited *Francis v. Franklin* (1985) 471 U.S. 307 [85 L.Ed.2d 344], which concerned jury instructions that effectively relieved the State of its burden of proof on criminal intent. As explained above, the trial court expressly instructed the jury it could consider evidence of defendant's mental disability in determining whether he formed "the mental state or specific intent" necessary for murder. We find *Francis* inapposite.

give this instruction because it precluded the jury from considering the evidence of his mental instability in making its guilt phase determination. Defendant cites no authority for this proposition, and his assertion of error is unsupported by the record.

Defendant pled not guilty and not guilty by reason of insanity, and accordingly his trial was bifurcated. (See *People v. Phillips* (1979) 90 Cal. App. 3d 356, 362; *People v. Guillebeau* (1980) 107 Cal. App. 3d 531, 542.) It is undisputed that the trial court correctly advised the jurors (1) that the case would be tried in two parts, a guilt phase and a sanity phase, and (2) that defendant was presumed sane in the guilt phase. By giving the challenged latter instruction, the trial court merely told the jury it could not consider in the guilt phase whether defendant was insane. (See *People v. Smith* (1973) 33 Cal. App. 3d 51, 75, overruled on other grounds, *People v. Wetmore* (1978) 22 Ca1.3d 318, 324.)

Evidence of defendant's mental condition was fully developed and argued by both sides, and the trial court never told the jury it could not consider evidence of defendant's mental condition as it bore on issues pertinent to guilt. The trial court fully instructed the jury relative to its duty to consider the evidence of defendant's mental condition and the prosecution's burden to establish defendant's guilt beyond a reasonable doubt. Defendant's opening brief asserts, "[b]y instructing the jury that the defendant is presumed to be sane, the trial court in effect told the jury that evidence raising a doubt of appellant's mental state at the time of the incident was not relevant or worthy of belief." However, something more is required than defendant's mere assertion the instruction had this effect or somehow affected the burden of proof. We note trial counsel did not take issue with the challenged instruction. This is an important point because trial counsel was better positioned to assess and pursue the matter.

We find no basis in this record for finding a reasonable juror would be misled by the challenged instruction.

B. *Argumentative Pinpoint Instructions: Guilt Phase*

Defendant contends "[t]he trial court erred by reading prosecution pinpoint instructions on specific items of evidence offered to establish guilt." (Capitalization omitted.) He argues we must reverse his conviction because CALJIC Nos. 2.03, 2.13, and 2.20 were "impermissibly argumentative," "unfairly focused on the rampant inconsistencies in [his] statements," and "focus[ed] undue skepticism on [his] tortured efforts to come to terms with his own irrational acts." He is mistaken.

It is improper to select "'certain material facts, or those which are deemed to be material, and endeavor[] to force the court to indicate an opinion favorable to the defendant as to the effect of such facts, by incorporating them into instructions containing a correct principle of law . . . . An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue.' [Citations.]" *(People v. Wright* (1988) 45 Ca1.3d 1126, 1135.) Accordingly, a court must "refuse an argumentative instruction, that is, an instruction 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' (Citations.]" *(People v. Mincey* (1992) 2 Ca1.4th 408, 437.)

The logic of defendant's argument would compel the elimination of all jury instructions pertaining to any evidence in any manner. Defendant reads *Wright* "far too broadly, as calling for elimination of jury instructions which focus the jurors' attention on particular categories of evidence." (See *People v. Fitzpatrick* (1992) 2 Ca1.App.4th 1285, 1296-1297.) We set forth the text of

the challenged instructions in the margin.[3] None of the challenged instructions incorporates specific items of evidence on a disputed question of fact urging the jury to draw inferences favorable to the prosecution. No specific items of evidence are mentioned in these instructions. Rather, defendant essentially argues that, *as applied,* these

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3. Pursuant to CALJIC No. 2.03, the trial court instructed the jury: "If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statements as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination."

Pursuant to CALJIC No. 2.13, the trial court instructed the jury: "Evidence that on some former occasion, a witness made a statement or statements that were inconsistent or consistent with his or her testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on such former occasion. [¶] If you disbelieve a witness' testimony that he or she no longer remembers a certain event, such testimony is inconsistent with a prior statement or statements by him or her describing that event."

Pursuant to CALJIC No. 2.20, the trial court instructed the jury: "Every person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness. [¶] In determining the believability of a witness you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following: [¶] The extent of the opportunity or the ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified; [¶] The ability of the witness to remember or to communicate any matter about which the witness has testified; The character and quality of that testimony; [¶] The demeanor and manner of the witness while testifying; [¶] The existence or nonexistence of a bias, interest, or other motive; [¶] Evidence of the existence or nonexistence of any fact testified to by the witness; [¶] The attitude of the witness toward this action or toward the giving of testimony; [¶] A statement previously made by the witness that is consistent or inconsistent with the testimony of the witness; [¶] An admission by the witness of untruthfulness."

instructions constituted argumentative pinpoint instructions because the instructions drew attention to the inconsistencies in his accounts of the incident.

The California Supreme Court has rejected the contention that CALJIC No. 2.03 is an argumentative pinpoint instruction. In *People v. Kelly* (1992) 1 Ca1.4th 495, the Supreme Court noted: "Defendant contends that CALJIC No. 2.03 is in effect a pinpoint instruction favorable to the prosecution, and it is no longer appropriate under the *Wright* analysis. [¶] CALJIC No. 2.03, however, does not merely pinpoint evidence the jury may consider. It tells the jury it may consider the evidence *but it is not sufficient by itself to prove guilt.* [Citation.] . . . If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider evidence. Nothing in *Wright* affects such an instruction. There was no error." *(Id.* at pp. 531-532, italics in original; see also *People v. Wimberly* (1992) 5 Ca1.App.4th 773, 795-796 ["reject[ing] appellant's argument that CALJIC No. 2.03 is an erroneous pinpoint instruction"].)

The same logic applies to CALJIC Nos. 2.13 and 2.20. We note these latter two instructions apply to credibility determinations for all witnesses -- both prosecution and defense -- not just to the defendant. Neither CALJIC No. 2.13 nor 2.20 specifies items of evidence. Moreover, these instructions merely provide guidelines in assessing evidence and do not mandate a particular outcome. Accordingly, the challenged instructions do not constitute argumentative pinpoint instructions.

C. *Argumentative Pinpoint Instructions: Sanity Phase*

Pursuant to *People v. Wright, supra*, defendant challenges four jury instructions given in the sanity phase - CALJIC Nos. 2.13, 2.20, 2.21.2, and 2.71 -- as argumentative pinpoint instructions. Defendant asserts

these instructions "focused undue attention on the inconsistent accounts voiced by [defendant]."

We rejected defendant's challenges to the use of CALJIC Nos. 2.13 and 2.20 in the guilt phase. We reject defendant's second attack on these two instructions based on their use in the sanity phase for similar reasons.

With respect to defendant's challenge to CALJIC No. 2.21.2,[4] this instruction "does nothing more than explain to a jury one of the tests they may employ in resolving a credibility dispute." (*People v. Blassingill* (1988) 199 Cal.App.3d 1413, 1419; see also *People v. Lang* (1989) 49 Ca1.3d 991, 1023 [upholding CALJIC No. 2.21].) It applies to credibility determinations of all witnesses, both for the prosecution and for the defense, and not just to the defendant. CALJIC No. 2.21.2 does not specify items of evidence, but instead merely provides guidelines in assessing evidence and does not mandate a particular outcome. CALJIC No. 2.21.2 is not an argumentative pinpoint instruction.

Finally, defendant challenges CALJIC No. 2.71, as modified.[5] Defendant argues, "CALJIC 2.71 was

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4. Utilizing CALJIC No. 2.21.1 and 2.21.2, the trial court instructed the jury: "Discrepancies in a witness's testimony or between his or her testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience; and innocent misrecollection is not uncommon. It is a fact, also that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to trivial detail should be considered in weighing its significance. [¶] A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars."

5. The trial court instructed the jury: "An admission is an out-of-court statement made by the defendant, other than one made to a psychiatrist, which is offered against him by the prosecution as tending, when compared with the other evidence, to discredit his

substantially modified to pinpoint an admission by the defendant, defined as an out-of-court statement which is offered against him as tending 'to discredit his claim of legal insanity,'" and that, as so modified, the instruction was argumentative. In particular, defendant asserts "[a]lthough the defense struggled to convince the jury that the inconsistent accounts were due to [defendant's] mental disorder and his effort to come to terms with the enormity of the tragedy that had befallen him, the instructions from the bench were weighted entirely to the effect that the inconsistencies could be construed against the claim of insanity."

Defendant misapprehends the import of this instruction. The instruction addressed only admissions, not inconsistent testimony generally.[6] The instruction exempted any statement to a psychiatrist, and explained (1) the jurors were the "exclusive judges" as to whether defendant made any admission; (2) if the jury found defendant did not make an admission, the jury must reject evidence of it; (3) if the jury found defendant did make an admission, the jury could give the admission "whatever weight" the jury deemed the admission entitled; and (4) the jury was instructed to view "an unrecorded, oral admission of the defendant not made under oath" with caution.

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claim of legal insanity. [¶] You are the exclusive judges as to whether the defendant made an admission. If you should find that the defendant did not make a particular admission, you must reject evidence of it. If you should find that an admission was made, you may give that admission whatever weight you deem it to be entitled. [¶] Evidence of an unrecorded, oral admission of the defendant not made under oath ought to be viewed by you with caution."

6. In his reply brief, defendant argues the trial court erred in giving CALJIC No. 2.71 in the sanity phase because "[o]ne does not 'admit' sanity . . . in the same way one 'admits' guilt." However, the instruction was appropriately tailored to define an admission as "an out-of-court statement . . . tending, when compared with the other evidence, *to discredit his claim of legal insanity.*" (Italics added.)

Far from presenting specific evidence and then attempting to skew the jury's perception of the evidence in the prosecution's favor, the challenged instruction presented the applicable principle of law pertaining to admissions and indicated no opinion as to any fact in issue. This is not an argumentative pinpoint instruction, and we find no error.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

SIMS, Acting P.J.

SCOTLAND, J.

APPENDIX H

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. section 1254 provides in pertinent part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. section 2253 provides in pertinent part:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

28 U.S.C. section 2254(a) provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in

> custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. section 2254(d)(1) provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

28 U.S.C. section 2254(e)(1) provides:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

California Penal Code section 187, subdivision (a), provides:

> (a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

California Penal Code section 1026, subdivision (a), provides in pertinent part:

> (a) When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court. In that trial, the jury shall return a verdict either that the defendant was sane at the time the offense was committed or was insane at the time the offense was committed. If the verdict or finding is that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law . . . .

California Penal Code section 1192.7, subdivision (c)(1), provides:

> (c) As used in this section, "serious felony" means any of the following:
> (1) Murder or voluntary manslaughter.

APPENDIX I

JURY QUESTIONNAIRE

DIRECTIONS

This questionnaire has been prepared to assist the Court and the parties in determining whether or not you may have had personal experiences or knowledge about the issues to be decided by the jury. Acquaintance with any of the parties, the lawyers or potential witnesses should also be disclosed.

This questionnaire is part of the record of a public trial. Please answer the questions honestly and with care. Your full and complete answers are desired.

Please note there are no right or wrong answers to any question. In the event that some of the questions call for sensitive personal information which you wish not to disclose please indicate that in your response by writing 'private' in the answer space or at the last question. You will be provided an opportunity to speak with the judge and the attorneys outside the presence of other jurors.

Please fill out completely in ink and **print** your answers. Since we need to make copies, do not write on the back of any page. If you need more room, continue at the bottom or side of the page, or on the last page, or request extra paper, (noting question number). Please complete this questionnaire by yourself and do not consult with anyone else. If you cannot recall a fact please note.

QUESTIONS

1. NAME:
   Age: Sex:
2. Place of Birth:
3. What neighborhood or area do you live in within the County?
   How long have you lived at that location:
   Do you own or rent your home?
   What other communities have you lived in?

4. What is your current job status?

____ working full-time	____ unemployed
____ working part-time	____ homemaker
____ retired	____ full-time student

5. OCCUPATION: (If retired or unemployed, answer regarding last job.)
   a. What is your occupation?
   b. By whom are you employed?
   c. For how long?
   d. What are your specific duties on the job?
   e. Where did you work previously and what did you do?
   f. Have you ever been a supervisor or had hiring or firing responsibilities?
      Yes No

   If yes, please describe:

6. What is the last level of education you completed?
   Grade school or less
   Some high school
   High school graduate
   Technical or business school
   Some college
   College graduate
   Post graduate work
   Attend law school

Please describe your educational background, including vocational school and/or colleges attended:

Name of school	Area of study	Degrees received

7. Please list any courses you have taken since your formal education. Please include credit and non-credit, self-improvement, seminars, religious, professional, or other courses of any kind:

a. Have you taken an courses in law, legal procedures, or criminal justice, or psychology? (If yes, please describe:)

8. What is your marital status?
   Single and never married
   Currently married and have been for ___ years
   Single, but married in the past for ___ years
   Single, but living with non-marital mate for ___ years
   Widowed/widower, married in the past for ___ years
   Other
9. Is your spouse or non-marital mate employed?
   Yes No
   a. If yes, what does he/she do and where is he/she employed?
   b. What other sorts of job has he/she had?
   c. If spouse/mate is not employed, what work outside the home has he/she ever done?
10. Please describe your spouse or non-marital mate's educational background? (Include last level of education completed and area(s) of study.)
11. If you have children, please state:

Name	Sex	Age	Lives w/you	Education	Occupation

12. What are your hobbies, major interests, recreational pastime and spare-time activities, including sports?

13. Please list all groups or organizations in which you participate or are a member. For example, service clubs, church or church groups, unions or professional organizations, volunteer activities, education or political groups:

14. Would you please check the income grouping which comes closest to describing your total family income before taxes:

    Under $10,000
    $10,000 - $19,000
    $20,000 - $29,999
    $30,000 - $49,999
    $50,000 - $74,999
    $75,000 or more

15. Do you know or have contact with any of the following people, businesses, law firms or agencies: Check by name if yes.

Charles Prebble
Gary Swanson
R. L. Riley
Ty Brown
Ken Osburn
Sgt. Berquist
William Benson
Judy Frank
Deputy Stanovich
Gary Boto
Guy Mohun
Liz Rehkop
Mike Hanson
Ron Perrea
Dr. M. McQuarrie
Dr. Joseph Tripoli
Dr. Irwin Lyons
Dr. Robert Bittle
Dr. Captane Thomson
Dr. Melvin Winer
Dr. Krissoff
Randy Nordmark
Kimberly Nordmark
Sheila Patterson
Laurel Hodges
Austin Hodges
Dave Sweetland
Virgil Maldonado
Dean Martinez
Diana Beidel
Kay Holleran
Joann Toulouse
Capt. Jack Bayer
Bob Boyer
Beverly Ends
Carolyn Mulpus
Gene Welch
Paul Lastuflca
Donald Foreman
Don Bossingham
John Sattler
Bill Evans
Judith Tye
William Morrow
Joe Aguera
Katherine Delp
D. Slominski
Nevada Co. Public Defender
Nevada Co. Sheriff

Nevada Co District Attorney
California Highway Patrol

16. Were you ever in the military? Yes No
    a. What branch:
    b. Dates of service:
    c. Rank or job:
    d. Where stationed:
17. What is your primary source of news? (Include name of newspaper and/or TV/radio station.)
18. What newspapers and magazines do you read regularly?
19. Do you belong to any religious organization or group that would prevent you from being able to decide this case? Yes No
    If yes, please explain:
20. Do you believe you would not be morally or philosophically able to make a decision in this case? Yes No
    If yes, please explain:
21. Do you belong to any organization or group that advocates a change in the jury system or the way juries approach the law? Yes No
    If yes, please explain:
22. Have you, your family members or close friends ever had a bad experience with law enforcement officers or prosecutors? Yes No
    If so please explain where, when and the circumstances:
23. Do you, have negative feelings about the Nevada County District Attorney's Office, California Highway Patrol, Nevada County Sheriffs Office, for any reason? Yes No
    If yes, please explain:
24. Do you feel you can give both the Defendant and the People a fair trial:
    Yes No

If no, please explain:

25. Are you a member of any group which advocates changes in the criminal law:
    Yes No
    If YES, please explain:
26. Have you, any relatives or close friend ever been employed by a law enforcement agency such as police, sheriff, highway patrol, IRS, FBI, parole, probation, jail or prison, drug enforcement agency, Immigration and Naturalization Service (INS), police reserve, National Guard, Customs, District Attorney, or United States Attorney General? Yes No
    If yes, please describe employment:
27. Have you or anyone close to you ever been the victim of a crime? (Including burglary, robbery, assault, etc.) Yes No
    If yes, please describe details:
    Were there any legal proceedings: (Please describe)
28. Have you ever been a witness to a crime, filed a report or other written document with the policy or other law enforcement agency, or had contact with the District Attorney's Office? Yes No
    If yes, please provide details:
29. Have you ever been called as a witness or given a deposition in any legal matter?
    Yes No
    If yes, please describe details:
30. Have you, or anyone close to you, ever participated in any group concerned with crime prevention or victim's rights (MADD etc.)?
    Yes No
    If yes, what group was this, please describe its purpose and your participation in it:
31. Have you, or anyone close to you, ever participated in any group which advocates for individual tights (ACLU etc.)? Yes No
    If yes, please state the group, its purpose, and the nature of your participation:

32. Have you ever served as a juror in the past?
Yes No
a. If YES, please provide the following information for each case:

Criminal or Civil	Charges/ Issues	When Served	Did Jury Reach A Verdict

b. How did you feel about your jury service?

33. Do you know any lawyers or judges? Yes No
If YES, what kind of law do they practice?
Please provide their names and relationship to you:

34. Have you, a close friend; or a relation ever been:
Arrested or charged with a crime? Yes No
In prison or jail? Yes No
Subject of an investigation Yes No
Expect to be subject of investigation Yes No
If yes, please explain:

35. Have you heard of the term "circumstantial evidence"? Yes No

36. Do you realize that circumstantial evidence is a fact or facts that you may reasonably infer from another fact or set of facts? Yes No

37. Is there any reason you would refuse to consider circumstantial evidence as a means of proving the facts in this case? Yes No
If yes, please explain:

38. Do you agree, Circumstantial Evidence may be the only way to ascertain a person's intent or mental state? Yes No

39. Would you reject circumstantial evidence as a means of proving specific intent or mental state?
If yes, please explain:

40. Have you studied psychiatry or psychology either formally or informally? Yes No

If yes, explain:

41. Have you read any books which have concerned themselves with psychiatric concepts or theories? Yes No
If yes, explain:
42. Do you have any relatives or close friends who are psychiatrists or psychologists? Yes No
If yes, explain:
43. Have you discussed with this individual the nature of his work or the concepts or theories in which he believes? Yes No
If yes, explain:
44. Has your friendship with this individual caused you to form any opinions either for or against psychiatric testimony? Yes No
If yes, explain:
45. Because of this friendship, would you be predisposed to accept the conclusions of a psychiatrist without testing the reasonableness of his opinion against the evidence and your common sense background? Yes No
If yes, explain:
46. Have any of your relatives or close friends ever been diagnosed as having a mental illness or hospitalized for mental illnesses? Yes No
If yes, explain:
47. Have you ever been treated by a psychiatrist or psychologist? Yes No
If yes, explain:
48. Have you ever taken any psychological tests? Yes No
If yes, explain:
49. Do you believe the results of psychological tests are always correct - infallible? Yes No
If yes, explain:
50. Do you agree the results may be subject to different interpretations? Yes No
51. Do you think psychiatry is an exact science such as mathematics? Yes No

52. Would you agree that the opinion given by a psychiatrist is necessarily based on his interpretation of what he has examined?
    Yes No
53. Have you heard of one doctor diagnosing a case one way and another doctor diagnosing a different way? Yes No

54. Do you believe that any of these people are necessarily dishonest because they interpret differently, do you? Yes No

55. If you find that a psychiatrist's opinion is unreasonable to you, based upon <u>your</u> view of the evidence and <u>your</u> common sense background, will you be able to reject an unreasonable opinion? Yes No
56. There are some people who read of a particular crime and might say to themselves,"Well, there's got to be something wrong with an individual who does something like that." Some people might react that way, don't you think?
    Yes No
    a. Do you agree that in this case, where there may be a defense of insanity, if you start out with that preconceived notion before hearing the evidence, then you will not be sitting as an impartial juror? Yes No
    b. From the nature of the charge itself, would you hold such a preconceived notion? Yes No
57. Do you have any feeling that a person who kills his own child must necessarily be mentally ill or crazy? Yes No
    If yes, explain:
58. Insanity, as referred to in this case, is a legal term not a medical term. Do you agree a person

can be mentally ill and under the law not insane? Yes No
Do you have a problem with that aspect of the law? Yes No

59. Would you wait to hear all the evidence before deciding to accept or reject any evidence including psychiatric testimony? Yes No
60. Do you appreciate that an expert witness, such as a psychiatrist or psychologist, is only here to help you decide the facts, but not to tell you what to think? Yes No
61. Before giving any weight to the testimony of an expert, would you be interested in the reasons that cause the expert to reach his opinion? Yes No
62. Do you accept the fact that psychiatrists and psychologists are after all human beings and they have to make judgments and decisions based on whatever tools they use? Yes No
63. Would you agree that any test in and of itself does not define somebody's state of mind; it has to be interpreted by another human being, doesn't it? Yes No
64. Do you agree that the results which are obtained from the use of any of the diagnostic tools that may be available to the experts are going to depend upon the validity of those tools and how they apply them? Yes No
65. Will you perform your function and decide whether the underlying reasons given for an opinion are reasonable and worthy of acceptance? Yes No
66. If the expert bases his opinion in part upon what the defendant told him, will you look at the defendant's statement to see if you think the defendant was telling the doctor the truth or not? Yes No

67. And, if you should find that the defendant told the doctor something that you find not to be factual, will you then evaluate the weight of the expert's opinion in light of such fact? Yes No
68. Have you ever heard the term Paranoid, Paranoid Personality, Manic/Depressive or Bipolar Disorder? Yes No
Have you ever known a person who has been diagnosed or paranoid or paranoid personality? Yes No
69. The charge in this case is murder. A human being was killed. Is there anything about the nature of this case which would make it difficult for you to listen and keep and open mind?
Yes No
70. There may be some graphic photographs of the crime scene and/or autopsy presented in this case. Is there anyone who would have difficulty viewing and considering such evidence?
Yes No
71. Do you think you would have a difficult time listening to and considering graphic testimony regarding the killing of a human being?
Yes No
72. The charge in this case involves the killing of a human being. It is a very serious and potentially emotional matter. There may be friends and relatives of both the defendant and the deceased in the court at various times. Will you be strong enough to reach a verdict <u>based solely on the evidence and the law</u> in spite of any feelings of sympathy you may have for either side? Yes No
73. Will you agree not to discuss the matter of possible penalties or punishment in this case or allow it to influence your deliberations in any way. I will advise you at this time, however, that this is not a death penalty case? Yes No
74. The standard of proof in <u>any</u> criminal case is proof beyond a reasonable doubt. It is the same

for a murder case as it is for a simple trespass or any other charged crime. Occasionally, some jurors believe the standard in a murder case should be higher because the consequences of a conviction may be serious. As I have said, however, the standard is no higher than in any other criminal case. Do you think it should be? Yes No
Would you be willing to apply the beyond a reasonable doubt standard to this case even though you personally think the standard should be higher?
Yes No

75. A defendant in a criminal case is presumed to be innocent until the contrary is shown and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. The People, therefore, have the burden of proving the Defendant guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. Do you have any problem with this standard of proof? Yes No
If yes, please explain:
76. Do you have any physical or medical problems which would make jury duty difficult for you? Yes No
77. Do you have any difficult with your vision or hearing? Yes No
If yes, please explain:

78. Is there any other information that you would like the court to know about your ability to serve as a juror in this case?

79. Is there any matter you would prefer to discuss privately with the court?

Yes No

I declare under penalty of perjury that the foregoing is true and correct. Executed this day _____ of November, 1993 at Nevada City, California.

Signature:_____

COPY

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No. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

JAMES H. GOMEZ, Director
Petitioner,

v.

MITCHELL ALFRED PATTERSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

APPENDIX
Volume II of II (J - N)

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ROBERT R. ANDERSON
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APPENDIX J

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF NEVADA

--o0o--

The People of the State of California Plaintiffs, vs. MITCHELL ALFRED PATTERSON, Defendant.	)	No. 49140

JURY TRIAL
JURY VOIR DIRE
(Partial Transcript)

November 18 & 19, 1993
December 2, 1993
Nevada City, California

BEFORE: Honorable JOHN H. DARLINGTON,
Judge of the Superior Court

APPEARANCES:

For the People: RONALD WOLFSON
Assistant District Attorney
Nevada County Courthouse
Nevada City, California

For the Defendant: DAVID HUMPHREYS
Deputy Public Defender
Nevada County Courthouse
Nevada City, California

--o0o--

Penny V. Gordon, CSR No. 6994

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November 18, 1993, Nevada City, California

--oOo--

(All names of potential jurors are spelled phonetically, as a jury panel list was not available)

THE COURT: Court will be in session in People versus Mitchell Patterson, number 49140. The defendant is present with counsel. And the District Attorney's office is represented.

Ladies and gentlemen, as you have already been told, you have been summoned here to determine your qualifications to act as trial jurors in this matter in a process known as voir dire. That is essentially a process by which you are questioned by the attorneys for the purpose of attempting to achieve a jury of 12 people to try the issues that are placed before them.

I understand there may be a couple of you who had questions concerning what's going to happen tomorrow. What we're going to do right now is start the what's called the voir dire process. If we're able in the next two or three hours -- it won't be three, but two anyway -- to select a jury in this case. Since you have already submitted questionnaires to the attorneys, we won't be in session tomorrow. That's if we're able to select a jury today.

Each side in the case by law is entitled to what are called 20 peremptory challenges. There is no way of knowing whether they're going to exercise all of those. If they do, this will be a very lengthy process, at least throughout today and all of tomorrow. On the other hand, if they choose not to -- and that's not something that any of us can predict. It will depend on the answers to the question -- we could be done much faster. So I don't know. If we do go tomorrow, court will be in session probably I would -- or not probably, but we will make a point of being in session from approximately 9:30

tomorrow morning until noon. Then, if necessary, from 1:30 until four o'clock. But if we are unable to select a jury by four o'clock tomorrow, then we will not complete the jury selection until December the first because I have already told you we will not be in session during the week of November 21st.

So that basically is the situation as far as tomorrow goes. So I can't tell you right now whether we'll be here tomorrow or not till we start this process.

Now, Madam Clerk, would you please swear all the prospective jurors.

She's going to ask each one of you to raise your right hand. You're going to be given the oath that you will answer the questions that are put to you by counsel, beyond the ones you have already signed here if there are any, truthfully.

Madam Clerk.

(Whereupon, the jury panel was sworn)

THE COURT: All right. Madam Clerk, would you call the first 13 names on the list. I believe the jurors already have received them. But for the purposes of where you sit. The first person called will take the first seat on my extreme left in the back row now. And we'll fill up the first six seats leaving the seventh one by the rail empty. Then six through 12 will take up the next six seats. Then I'll decide if we put anyone in the 13th seat or not. We may just leave it vacant at this time. So call the first 12, please.

THE CLERK: John Ford.

THE CLERK: Josephine Vaughn. Elizabeth DeVoyer. Douglas MacIntosh. David Vintze.

THE COURT: How is that spelled?

THE CLERK: V-i-n-t-z-e.

THE CLERK: Ronald Reed. Gary Keith. Denny Bildoe. Donna Rolder. Sandra Reckner. Margarethe Severns. Susan Freeman.

THE COURT: All right. Ladies and gentlemen, you have already received a questionnaire. The attorneys have had an opportunity to go through those questions. I have

not seen them, although there is a stack of them here in case any questions come up that I need to review them for. I'm going to ask just a few general questions of you as a panel. And everyone in the audience please listen to the questions because, as undoubtedly will happen, you may end up in one of these seats. And we are going to simply ask you at that time if you have heard all the questions that have been asked, and if your answers would be significantly different. So it's important for everyone to listen to the questions.

After having reviewed the questionnaires and complied with them to the best of your ability, is there any one of you who now feels at this point that there is any reason why you might be biased or prejudiced in any way against either the People or the defendant in this case from what you know so far? Mr. Reed, yes. Could you elaborate a little bit for us.

JUROR SEAT NO. 6: I'm having trouble during the penalty phase accepting insanity as a defense.

THE COURT: Uh-huh. There is no penalty phase per se in this case. In this particular case there is a two-part situation. The defendant has entered a plea of not guilty. The charge is murder. I should indicate to you that it is alleged in the Information that he -- and I say the Information is a pleading that the clerk is going to formally read to you once we have a jury selected. But the charge, the Information, which as I say is not evidence, it's simply a charge, is that the defendant murdered his daughter who was at the time approximately I believe ten years of age. To that charge he has entered a plea of not guilty which means he's contesting the elements necessary to prove the charge of murder.

He's also entered what's called a plea of not guilty by reason of insanity. What that means is that the jury will first try the question of whether or not he is guilty of murder or any of the lesser legally included offenses of murder which include manslaughter. And if the jury concludes that he's not guilty of any of those offenses, then there is no pen -- or sanity trial or sanity phase. If

the jury ultimately concludes that he is guilty of some criminal offense, then he is entitled to proceed on his plea of not guilty by reason of insanity and have a sanity trial.

The question that is first asked of each of you is would you if you were selected as a juror in this case follow the legal definition of -- and you got through the guilt phase of the case and found the defendant guilty and we went to the sanity phase, would each of you follow the law as it was given concerning the definition of insanity and listen to the expert testimony as well as possibly lay testimony because our law allows lay people under certain circumstances to express opinions about sanity. And I don't know if there will or won't be any of those. I do know there will be expert witnesses for sure. The question is will you listen to all that evidence, will you impartially review it and follow the law after you determine which evidence you believe with respect to the issue of sanity, or do you have a prejudice that you feel would cause you to automatically reject any testimony that the defendant was insane no matter what the basis for that testimony was. That's really what the fundamental question is. Could you follow the law even though you might personally have some personal hang-ups about even allowing sanity evidence in criminal trials. There are a lot of people and there have been debates about whether that even has a place in the criminal system. But as a juror you have to assume the law as it is, not how you might like it to be. And the question is can you follow it. You feel you could follow it as it is regardless of your personal feelings about that.

JUROR SEAT NO. 6: Yeah.

THE COURT: You feel you could?

JUROR SEAT NO. 6: Uh-huh.

THE COURT: All right. And I'll allow the attorneys to ask you some additional questions about this because I'm sure both of them will have questions based on your questionnaire answers.

Does everyone understand what Mr. Reed and I have been talking about here? At this point you all understand

that one of my next questions is going to be will all of you agree to follow the instructions which means the law as I state it to you and not the law as you might think it ought to be. In other words, what you discuss with people over a dinner conversation about what's wrong with the legal system or what's right with it is not important today. What's important today is that you listen -- that is important in this trial is that you listen to all the evidence, that you make your best judgment as to what you believe the truth is and that you apply that truth to the law as I give it and reach a decision regardless of what the consequences of that decision might be. Do all of you understand that that's your duty as jurors, and are all of you willing to follow it?

JURORS: Yes.

THE COURT: Now, given the fact, as I said before, the charge involves murder and involves murder of a child of the defendant's child according to the Information. And if the evidence were to show that, is there any one of you who feels because of a personal experience or for some other reason that you could not sit in a case and fairly judge the issue of his guilt just by virtue of the type of charge? Is there any one of you who feels that that would stop you right there? Okay. None of you then have had a family member or a small child killed in a criminal manner or anything along that line that that would so affect you that you would have difficulty listening to this type of case?

The other question I think that's raised in the questionnaires is -- I don't know your answers, but I will cover it just briefly before the attorneys do -- is it's undoubtedly in a case of this kind where there is a question concerning the state of mind of the defendant at the time the offense occurred, often the prosecution will as part of its case in chief offer certain photographs of the alleged murder victim. And sometimes these photographs are not particularly appealing for lay people to look at. Some of you who may have had experience if you had in the medical field probably won't be surprised by it. Those

of us that have been involved in the criminal justice system have seen photographs like it before. But often times people right off the street don't have experiences with looking at dead people. Perhaps other than in a mortuary. So is there anything about the fact that there might be gruesome photographs or at least a few of them that would in your mind turn you off to being able to fairly and impartially judge the evidence in this case? All right. The record will reflect there are no responses.

Is there any one of you -- next I'm going to ask the attorneys to identify themselves, and also I'm going to ask Mr. Humphreys to identify his client. And I'm going to ask you a few questions related to that. Mr. Humphreys.

MR. HUMPHREYS: Thank you, Your Honor.

Ladies and gentlemen, as the judge told you yesterday and this morning, my name is David Humphreys. I'm a deputy public defender with Nevada County. It's my privilege and duty in this case to represent Mitch Patterson. Would you stand up, Mitch, let them take a look at you. Thank you.

THE COURT: Thank you. You may both be seated.

THE COURT: And the People are represented by Ron Wolfson who is assistant district attorney. If you would identify yourself. And since the witnesses are already listed in the questionnaire, I won't ask you to recite all their names.

MR. WOLFSON: I won't recite the names of the witnesses. They are listed. My name is Ron Wolfson. And as His Honor indicated, I'm the assistant district attorney representing the People in this case.

THE COURT: All right. And the next question obviously which was not in the questionnaire, do any of you know either of the attorneys that are here in the courtroom? All right. Mr. Ford?

JUROR SEAT NO. 1: I know Mr. Humphreys very well.

THE COURT: All right. And is that socially or professionally or both?

JUROR SEAT NO. 1: Professionally.

THE COURT: And, as I understand it, you have a -- you have been employed in Placer County in law enforcement; is that correct?

JUROR SEAT NO. 1: Yes.

THE COURT: Are you still currently employed there?

JUROR SEAT NO. 1: Yes, I am.

THE COURT: Is there anything about your relationship or your knowledge of Mr. Humphreys that you feel in this case would make it difficult for you to render a verdict contrary to the position that he might be advocating as an advocate in this trial?

JUROR SEAT NO. 1: No, there isn't.

THE COURT: On the other side, would there be any difficulty do you feel because you're in law enforcement if you did agree with Mr. Humphreys in terms of the facts of the case, any difficulty in returning a verdict that would be contrary to what might be perceived as the law enforcement position?

JUROR SEAT NO. 1: No, there wouldn't be any problem.

THE COURT: Is there anyone else who knows either of the attorneys? That's in the jury box. There may be some of you out here, I'm sure. Is there any one of you who knows Mr. Patterson? All right. Is there any one of you who has read anything about this case that sticks in your mind at the present time? It may have been covered in the t.v. media some months ago, especially in the Reno area and the Truckee area. Is there anything that you can recall reading about the case, any of you?

JUROR SEAT NO. 2: I remember hearing about it if it's what I think it is.

THE COURT: All right. What do you remember?

JUROR SEAT NO. 2: With the truck.

THE COURT: Involve a truck?

JUROR SEAT NO. 2: Yes. Uh-huh.

THE COURT: Up on Interstate 80. What all did you hear about it that you can remember now?

JUROR SEAT NO. 2: That I remember from the news media is that he got out of the car and carried the daughter and threw her in front of a truck is my understanding.

THE COURT: Okay. That's what the news media reported?

JUROR SEAT NO. 2: Yes.

THE COURT: Do you believe that what the news media reported is true at this point, or do you know?

JUROR SEAT NO. 2: I have no idea. I have known them to be wrong before. I'm an avid mystery reader, so.

THE COURT: You haven't formed any opinion in your own mind at this point, have you, as to whether Mr. Patterson did what was reported to you?

JUROR SEAT NO. 2: It's been so long that I really hadn't thought about it.

THE COURT: Well, if the evidence discloses that there was a semi truck and that there was an accident on, or not an accident, whatever, that there was a death on Interstate 80, and some of these pieces that you do have in your memory are brought back, do you understand that your duty as a juror would be to try this case on what happens in this courtroom and not base your decision on what you might have read or heard from somebody or seen on t.v.?

JUROR SEAT NO. 2: I think I could do that.

THE COURT: All right. Then I am going to allow the attorneys to ask some questions since they are the people who have the primary responsibility in this case of selecting the jury.

Mr. Wolfson, if you want to ask a few questions?

MR. WOLFSON: Thank you, Your Honor. I do. I will be directing the questions to individual members of the panel based on the answers that you have given us in your questionnaire. I thank you for being as candid as you have been in the questionnaire. I'll start with Mr. Ford.

Mr. Ford, you answered question 57. You probably don't remember the number as it matches up the

question, nor would we expect you to. The question is, "Do you have any feeling that a person who kills his own child must necessarily be mentally ill or crazy?" You answered that yes. And indicated there must have been something, at least there must have been at least a momentary lapse from reality to accomplish such offense. Is that the way before hearing the evidence you just view?

JUROR SEAT NO. 1: Being a parent myself, yeah.

MR. WOLFSON: Would that notion affect your ability to sit in judgment on this case?

JUROR SEAT NO. 1: No, not at all.

MR. WOLFSON: Because the case will be, as His Honor indicated, a bifurcated trial and be two issues -- the guilt phase and then the sanity phase. And there will be as His Honor also indicated expert testimony. Will you be able to listen to the expert testimony and set your feeling aside and judge the case based on your opinion of how accurate and valid the expert testimony and the other facts that you'll be presented during the trial?

JUROR SEAT NO. 1: Yeah, I wouldn't have any problem with it.

MR. WOLFSON: The sanity phase of the trial -- strike that. We use the term mentally ill or crazy in relation to somebody who killed his own child. And you answered yes. How would you -- how do you view the answer? Do you think the person might be mentally ll? Do you think the person might be insane?

JUROR SEAT NO. 1: More along the line in a sanity rather than mentally ill. Mentally ill can be a continuing problem.

MR. WOLFSON: Then in question 58 we ask about insanity as referred to in this case is a legal term, not a medical term. If you're instructed, in fact you're asked to, do you agree a person can be mentally ill under the law and under the law not insane? Are you willing to recognize the difference?

JUROR SEAT NO. 1: Yes.

MR. WOLFSON: And you will be instructed as to the definition of legal insanity. If evidence is given which

makes you believe or presented that makes you believe the person is in fact mentally ill, but you find that that person does not under the law would not be considered under the law insane, would you be able to separate the two concepts?

JUROR SEAT NO. 1: Yeah, I think so.

MR. WOLFSON: Would that trouble you that you would be asked to separate the two concepts?

JUROR SEAT NO. 1: No.

MR. WOLFSON: If I ask you if you have heard the term psychotic before?

JUROR SEAT NO. 1: Quite often.

MR. WOLFSON: Or major mental illness.

JUROR SEAT NO. 1: Very much so.

MR. WOLFSON: And you were instructed that in order for a person to be legally insane, they would have to either not be able to understand the nature and quality of their act or be able to distinguish right from wrong. But, again, the person -- and you felt they could understand or did understand the nature involving their act and were able to distinguish right from wrong. And yet you believed that the testimony or the evidence presented that the person might be mentally ill was correct, would you be able to separate those two concepts and reach a verdict based on the law?

JUROR SEAT NO. 1: Yes, I would.

MR. WOLFSON: Thank you.

Ms. Vaughn, you answered the same question 57 with a yes. That question being, "Do you have any feeling that a person who kills his own child must necessarily be mentally ill or crazy?" And then when asked to explain you said, "Or drunk or on drugs."

JUROR SEAT NO. 2: Well, to me it wouldn't be normal reaction for a parent. And those things came to mind.

MR. WOLFSON: Would you probably feel that the act itself is one that's crazy or makes no sense?

JUROR SEAT NO. 2: Right.

MR. WOLFSON: You would agree that crazy acts or acts that make no sense are committed by sane persons?

JUROR SEAT NO. 2: It was a very difficult question. I honestly don't know because I have no conception of doing something like that.

MR. WOLFSON: Do you think you would carry over your feeling about that issue into your deliberation as a juror?

JUROR SEAT NO. 2: I think that whatever was presented, how it was presented would -- that that's what I would follow, not what some notion that I might have had from him back or something. I would feel that if it was explained certain ways that I would take and weigh what was given. I don't know.

MR. WOLFSON: You heard me asking Mr. Ford about would he be able to distinguish his feeling regarding potential mental illness or craziness of the person committing the crazy act, and the law as it applies to legal sanity or insanity?

JUROR SEAT NO. 2: I think I could rationally do it.

MR. WOLFSON: Do you you know what the term psychotic?

JUROR SEAT NO. 2: I've heard it. I don't know quite what it means.

MR. WOLFSON: Do you believe psychosis affects a person's -- you'll hear affects a person's ability to among other things to view accurately reality. And you will be instructed that even if a person is psychotic or mentally ill, if they can and do understand the nature and quality of their act which simply means what they have done or they're doing, and can distinguish right from wrong, they are not legally insane. Do you have a problem with that --

JUROR SEAT NO. 2: No, I don't.

MR. WOLFSON: -- idea or concept? Can you follow that instruction if given?

JUROR SEAT NO. 2: (Nods affirmatively).

MR. WOLFSON: You also answered a question regarding circumstantial evidence which was question 37. "Is there any reason you would refuse to consider circumstantial evidence as a means of proving the facts in this case?" You answered yes. Then you answered if yes, please explain. If that's all there was. And you went on and answered, do you agree circumstantial evidence may be the only way to ascertain a person's intent or mental state.

THE COURT: Let me stop here. I think perhaps I ought to read the instruction since there is a -- there are questions in your questionnaire and you weren't told what the legal definition of circumstantial evidence and other forms of evidence might be.

Evidence consists -- this is an instruction you will receive if you're selected as a juror in the case. Evidence consists of testimony of witnesses, writings, material objects or anything presented to the senses and offered to prove the existence or nonexistence of a fact. You'll notice that your present notions and ideas about things are not evidence. So evidence is only something that you hear here in this courtroom either from this witness stand or in the form of documents, photographs, things of that kind. Evidence is either direct or circumstantial. Direct evidence is evidence that directly proves a fact without the necessity of an inference. It is established it is evidence, which by itself, if found to be true, establishes that fact. So my observation of you and your observation of me is direct evidence of that fact. It doesn't require any inference for you to believe that I'm sitting here behind this bench and you're sitting in the jury box. That's we don't need to make any inferences to establish that. If you went across the hallway and testified and you saw me sitting here, that would be direct evidence. On the other hand, circumstantial evidence is evidence that if found to be true proves a fact from which an inference of the existence of another fact may be drawn. An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by

the evidence. It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct evidence and circumstantial evidence are acceptable as a mean of proof. Neither is entitled to any greater weight than the other. And what that means is that you may base a decision in a criminal case or a civil case entirely on circumstantial evidence, entirely on direct evidence or on a combination of both. And the law says that's what you must do.

And so the question is do all of you agree that you will follow that instruction if it's given to you. Oftentimes we hear in the news media and other places things about circumstantial evidence. And it's never really legally defined for us. The only time I have ever heard the term defined, legally defined, is in a court of law. So like much of our understanding of the insanity defense and many of these other things, we get opinions that are not based on legal concepts, but based more on gossip, rumor, whatever. So it's very important in this voir dire process to try to sort out these concepts that there are legal concepts that are much different than what you hear or understand from life out on the street, you might say, or secular lives outside the courtroom.

All right, Mr. Wolfson, you may proceed.

MR. WOLFSON: May I give an example?

THE COURT: If you want. I have known of judges to get in trouble trying.

MR. WOLFSON: An example of the difference between direct evidence and circumstantial evidence would be if you were to leave a cookie jar and tell your child do not eat the cookies out of the jar and know there are ten cookies in the jar. And leave the room. As you're coming back find the child taking a cookie out of the jar and eating it. That's direct evidence you have seen the child or taking the cookie and doing what you didn't want. Circumstantial evidence would be the child you would be the only person in the house besides. Your child is given the same instruction knowing there are ten cookies in the

jar. Coming back after being out of kitchen for awhile and finding eight cookies in the jar and finding the child sitting in the corner with crumbs on the child's face and a smile. That's circumstantial evidence. You didn't actually see the cookies being taken, but there were facts that you could reasonably infer that the cookies were taken by the person you believed to take the cookies.

In the case that we're going to be dealing with, the act itself is not going to be proven by circumstantial evidence but by direct evidence. We're going to prove by circumstantial evidence the intent and the mental state of the defendant. And we asked a question, do you agree that circumstantial evidence may be the only way to ascertain a person's intent or mental state. And in this particular case there will be a combination of circumstantial evidence and direct evidence used to prove the mental state. But it's not, would you agree it's not possible to open up a person's mind or window in the person's mind and actually look in and see what they're feeling or thinking? You would agree? And you may have to go by what the person said or what the person did in order to attempt to ascertain or infer from other facts what the person's intent or mental state was.

JUROR SEAT NO. 2: I understand it.

MR. WOLFSON: Understanding it, do you have any problem?

JUROR SEAT NO. 2: No.

MR. WOLFSON: The concept. And going back to the previous issue in question of the insanity being a legal term. As you have been instructed previously, there will be possibly be two phases to the trial. A guilt phase and a sanity phase which comes after the guilt phase. There will be definitely a guilt phase and sanity phase would follow with if a finding of guilt occurs. There will most likely be and probably am safe in stating or assuming there will be some psychiatric testimony during the guilt phase. But there is also a presumption during the guilt phase, even though there has been a plea as His Honor indicated of not guilty and not guilty by reason of insanity,

there is a presumption during the guilt phase that the defendant was sane. Do you have any problem if you hear testimony that there might have been a mental disorder or mental disease with following the presumption that he was sane at the time of the alleged act? And do you understand what I said?

JUROR SEAT NO. 2: More or less. Open minded.

THE COURT: It's difficult to keep these two concepts together that you can enter a plea of not guilty by reason of insanity. But that doesn't mean that your first function is to decide whether the defendant is sane or not. The first function is to decide whether he did what he's accused of doing. And the charge of murder involves the unlawful killing of another human being with what's called malice aforethought. Analysis, a state of mind. When you're deciding whether malice exists in the defendant's state of mind or existed in the defendant's state of mind or whether when you're deciding whether or not he did what's called deliberation and premeditation which is another form of state of mind, when you're going through that process in the first phase of the trial, you're assuming that he's sane while you're going through that process. You make your first decision based on that assumption. You might find that he did have the mental state of malice even though he's mentally ill. You may find that he was not mentally ill at all and therefore and also had the state of mind of malice. You might find that he's mentally ill and did not have the state of malice. But none of that is involved in determining whether or not he's sane. If that helps at all. So your first function is deciding if this is -- by the way, I think the attorneys will also say this is not a who done it. We're not here to decide if he or somebody else did it. The question is what was his mental state at the time that these events occurred. And that's for the purpose of making those determinations, the law assumes that he is sane. Then you decide if in spite of the fact that all of these things happened, was he legally insane. That's another process that you go through afterward.

All right. You may proceed.

MR. WOLFSON: Did the judge clarify?

JUROR SEAT NO. 2: Yes.

MR. WOLFSON: I also note that one of the questions asked the charge in this case is murder. A human being was killed. Is there anything about the nature of this case which would make it difficult for you to listen and keep an open mind. And you did answer, "I don't know." Now, keep in mind as I ask you these questions and as counsel asks you the questions, we're expecting and hoping that you're able to give both the defendant and the People a fair trial.

JUROR SEAT NO. 2: I think I can. Like I say, those questions when they're first thrown at you are kind of different. I have just never had anything this serious that involved this.

MR. WOLFSON: They are. And they are difficult. And we all appreciate your candor. But as you sit here, do you think you can keep an open mind?

JUROR SEAT NO. 2: Oh, yes.

MR. WOLFSON: Thank you. Mrs. DeVoyer, how are you today?

JUROR SEAT NO. 3: Fine, thank you.

MR. WOLFSON: Sometimes I tend to speak a little too low.

JUROR SEAT NO. 3: Yes, you do.

MR. WOLFSON: Thank you.

THE COURT: You asked for that one, counsel.

MR. WOLFSON: I did. And if you have -- if anybody has any difficulty in hearing me, please indicate. Is there any anything that we just discussed with the first two potential jurors that you would like to bring up or have us be aware of?

JUROR SEAT NO. 3: No, I don't think so.

MR. WOLFSON: Can you hear me?

JUROR SEAT NO. 3: Yes, sir. Yes, sir.

MR. WOLFSON: I notice you indicated that you're going to be 81 on by December 12th. I hope we're

finished, but we may not be by then. That you don't hear as well as you used to.

JUROR SEAT NO. 3: That's true.

MR. WOLFSON: But you have been able to hear me and hear His Honor.

JUROR SEAT NO. 3: Yes, sir.

MR. WOLFSON: Probably His Honor better than me.

JUROR SEAT NO. 3: Yes.

MR. WOLFSON: You have never been on a jury before.

JUROR SEAT NO. 3: No.

MR. WOLFSON: And I think you have been able to pick up from our discussions what the nature of the case is going to be.

JUROR SEAT NO. 3: Yes, sir.

MR. WOLFSON: Is there anything about the nature of the case that you think would be disturbing or upsetting to the degree that you couldn't sit on as a juror?

JUROR SEAT NO. 3: No. No, I don't think so.

MR. WOLFSON: You heard the questions I asked Juror No. 1 and Juror No. 2 about the difference between somebody who might be suffering from a mental defect or disease and the legal definition of insanity as being different?

JUROR SEAT NO. 3: Yes, sir.

MR. WOLFSON: Is there any problem you have with that concept?

JUROR SEAT NO. 3: No.

MR. WOLFSON: All right. Thank you very much.

JUROR SEAT NO. 3: You're welcome.

MR. WOLFSON: I don't actually have to open up the questionnaire to know what I have to ask Mr. MacIntosh. Mr. MacIntosh, do you have any connection with any of the agencies, either formally or informally.

JUROR SEAT NO. 4: Yes, I do.

MR. WOLFSON: And that's a relationship with somebody in the District Attorney's office?

JUROR SEAT NO. 4: Yes, sir.

MR. WOLFSON: It happens to be the person working directly with me on the case?

JUROR SEAT NO. 4: I think so.

MR. WOLFSON: Have you heard anything prior to knowing you were going to be a potential juror on the case about the case?

JUROR SEAT NO. 4: No, I haven't.

THE COURT: Counsel wish to approach the bench, or do you want to --

MR. WOLFSON: If Mr. Humphreys requests.

THE COURT: You want to stipulate that Mr. MacIntosh be excused, or do you want to go through the voir dire process. Do you feel there is anything at this point that would justify doing that at this point?

MR. HUMPHREYS: Well, I haven't heard anything so far that would indicate Mr. MacIntosh can't be fair and impartial. So.

MR. WOLFSON: Okay.

THE COURT: I'll let you go on to those questions then.

MR. WOLFSON: I certainly will.

Do you feel you have, because you have a relationship with somebody in the office, that you could not be fair and impartial?

JUROR SEAT NO. 4: I feel I can be impartial. I don't hear anything. So if you don't hear anything, you can't be partial one way or the other.

MR. WOLFSON: You heard the questions regarding circumstantial evidence?

JUROR SEAT NO. 4: Yes, sir.

MR. WOLFSON: Do you have any concerns about the use of circumstantial evidence in trying to prove an element of an offense?

JUROR SEAT NO. 4: As long as I know what the judge would stipulate on that. I have no reservations.

MR. WOLFSON: Would you agree that sometimes in order to prove somebody's mental state or intent, it may be the only way it can be done is using circumstantial evidence?

JUROR SEAT NO. 4: Yes, sir, I do.

MR. WOLFSON: And you heard the question I I asked about the difference between legal insanity and just somebody suffering from a mental disease or defect of some sort?

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: You understand there is a difference.

JUROR SEAT NO. 4: Yes, I do.

MR. WOLFSON: Do you have a problem with that concept?

JUROR SEAT NO. 4: No, I don't.

MR. WOLFSON: And you also heard the question I asked about there seems there could be some folks just say if one were to kill his own child, there must be something wrong there. The person must be sick. Do you agree with that concept or do you believe that a person can commit an act which on the face of it seems crazy without being mentally disturbed?

JUROR SEAT NO. 4: I feel anybody can commit any kind of an act or presume that they committed the act.

MR. WOLFSON: All right. Thank you.

Mr. -- probably will pronounce it incorrectly -- Vintze?

JUROR SEAT NO. 5: Vintze.

MR. WOLFSON: You have heard the questions we have -- I have asked of the other potential jurors?

JUROR SEAT NO. 5: Uh-huh.

MR. WOLFSON: Is there anything you would like to comment on or bring up?

JUROR SEAT NO. 5: No, nothing I disagreed with.

MR. WOLFSON: You did have some concern about circumstantial evidence, but your concern that's, I guess -- and tell me if I'm misstating your concern. Apparently, you believe that the circumstantial evidence itself has to be connected with what we're concerned about before you would accept it?

JUROR SEAT NO. 5: Right.

MR. WOLFSON: So you would want to hear relevant circumstantial evidence?

JUROR SEAT NO. 5: Yeah.

MR. WOLFSON: But you do agree that it may be that circumstantial evidence may be the only way to estimate a person's intent or mental state since we really can't open up a person's mind and look in directly?

JUROR SEAT NO. 5: Yeah, I don't know of any other way at this point.

MR. WOLFSON: And I note you took some psychology classes I guess in college?

JUROR SEAT NO. 5: Yeah. I know in the community college I had to take a psychology class. But, to be honest with you, I don't remember that much about it.

MR. WOLFSON: But you probably heard the terms mentally ill or mental defect or disease or psychotic?

JUROR SEAT NO. 5: I have heard them. I don't know if it was in that context of the class or just in the context of news.

MR. WOLFSON: If you believed that a person -- that the evidence showed a person was mentally ill or psychotic but still did not meet the legal definition for insanity, that create a problem for you?

JUROR SEAT NO. 5: No.

MR. WOLFSON: And you agree that a person can be mentally -- that there are degrees of mental illness?

JUROR SEAT NO. 5: Yeah, I would think there would be.

MR. WOLFSON: And that a person can function even though the person might suffer from a mental illness?

JUROR SEAT NO. 5: Yeah, I would think that would be possible.

MR. WOLFSON: And a person might be able to function quite well and plan and plot or scheme or plan ahead, plan life, plan things they do?

JUROR SEAT NO. 5: Again, I think anything would be possible.

MR. WOLFSON: Is there anything about the case that makes you feel you could not be fair or impartial to either the People's side or the defense side?

JUROR SEAT NO. 5: No.

MR. WOLFSON: You are a planner?

JUROR SEAT NO. 5: Yes, city planning.

MR. WOLFSON: For?

JUROR SEAT NO. 5: Planning Concepts in Nevada City.

MR. WOLFSON: You work for a private organization?

JUROR SEAT NO. 5: Yeah, private consulting firm.

MR. WOLFSON: Thank you. Mr. Reed, how are you today?

JUROR SEAT NO. 6: Fine, thank you.

MR. WOLFSON: You indicated earlier that you did have some problem with the issue of the insanity phase?

JUROR SEAT NO. 6: I'm having trouble with relationship between mental state and responsibility for it. And that.

MR. WOLFSON: It's a very valid concern, but you indicated you felt you could put whatever predisposition you had aside and treat and be fair and impartial and judge the case fairly and impartially both for the defendant and for the People.

JUROR SEAT NO. 6: If it got to the point of mental state being defense, I don't think I could handle it.

MR. WOLFSON: If you heard evidence, as we asked some of the other jurors, that there was a potential possible or in the expert's opinion mental defect or disease, but then heard that there was a legal definition of insanity, would you be able to put aside your feelings about a person who claimed they were insane, and if you felt they met that legal definition; in other words, could not determine the nature and quality of the act or determine right from wrong. Would you be able to give that -- and they proved that to you, they have to prove it by preponderance of the evidence. Would you be able to set aside your feeling if you believed that the evidence

showed the person either couldn't understand the nature and quality of their act or determine right from wrong and make a finding that person was insane?

JUROR SEAT NO. 6: It's more a belief than a feeling, but I don't think I could.

MR. WOLFSON: We're interested, as I indicated before, in giving defendant a fair trial and of course the People a fair trial too. Why do you think you could not?

JUROR SEAT NO. 6: I'm having trouble with the mental state being a excuse for something for behavior -- criminal behavior.

MR. WOLFSON: But if the court instructs you that the law allows a person who is -- the law allows you to make a finding if certain circumstances and facts are believed by you that the person is insane, do you think you can do it, or do you think you would not be able to? In other words, would you be able to follow the law?

THE COURT: I think --

JUROR SEAT NO. 6: He could be insane, but.

MR. WOLFSON: It wouldn't make a difference?

JUROR SEAT NO. 6: It wouldn't make a difference of my idea or responsibility.

THE COURT: I was just going to say that, you know, sometimes people say that the crazy person points a finger at you and says, "Bang, bang, you're dead," and the sane one points a gun at you and says, "Bang, bang, you're dead." Assuming that you had a situation as bizarre as someone pointing their finger at somebody and/or putting their hand in a coat simulating a gun, and the person were to die of a heart attack on the spot, and the person were charged with murder by some possibility, would you be able to find -- and all the doctors said the person was crazy within the legal definition. In other words, a lot of sane people can do crazy things, and a lot of crazy people can do sane things. But if the evidence were that this person was actually had a finger in their pocket and was just absolutely and totally at the point of needing hospitalization even, do you think you could find such a person insane; or do you think that the mere fact

they're charged with a crime would lead you to conclude that you could not find them insane?

In other words, is the issue here the fact that he's charged with a crime. And you feel that if you're charged with a crime, you should not as a matter of principal be allowed to plead insanity? Is that what you're basically saying?

JUROR SEAT NO. 6: Yes.

THE COURT: I think then that we'll excuse you, sir. I think at this point. Thank you very much for your candor.

JUROR SEAT NO. 12: Excuse me. I totally agree with him.

THE COURT: Well, I didn't figure he was the only one. We have to do this one step at a time. Madam Clerk, would you fill in the.

THE CLERK: Robert Porta.

THE COURT: We'll get to you. Mr. Porta, you have heard the questions that have been asked so far?

JUROR SEAT NO. 6: Yes, I have.

THE COURT: And you heard these questions concerning this question of the insanity defense. Do you think you understand what we're looking for here?

JUROR SEAT NO. 6: Yes, I do.

THE COURT: And any comments you would like to make concerning any of the questions you have been asked -- the other jurors have been asked so far that you heard?

JUROR SEAT NO. 6: No.

THE COURT: So you don't feel that the mere fact that someone is charged with a crime and has pled not guilty by reason of insanity would be a problem for you if the evidence showed, demonstrated to your satisfaction that they were insane under the law?

JUROR SEAT NO. 6: Right. I feel no problem.

THE COURT: All right. Mr. Wolfson.

MR. WOLFSON: Do you have any trouble hearing me?

JUROR SEAT NO. 6: No, I don't.

MR. WOLFSON: Mr. Porta, let me just quickly go through your questionnaire, if you would allow me to.

JUROR SEAT NO. 6: Sure. You heard His Honor ask you the question if all or ask the question if all the doctors agreed and they believe the person was insane, if the doctors might agree -- very hypothetical -- but you didn't agree with either what they're testifying to or the basis under which they're making their assumptions, would you be able to separate their mere opinion from your own evaluation of all the facts in a case, and what you believe the basis of their opinion is?

JUROR SEAT NO. 6: Yes, I would.

MR. WOLFSON: And I think you answered a question like that. We also do you agree that one doctor might believe one diagnosis, another doctor might believe something else?

JUROR SEAT NO. 6: Oh, yes.

MR. WOLFSON: And they might both be -- I guess they both can't be right, but they might both be wrong, and the third doctor might come in and be right?

JUROR SEAT NO. 6: They are stating what they believe.

MR. WOLFSON: And an opinion is just that?

JUROR SEAT NO. 6: Right.

MR. WOLFSON: An opinion is not -- you believe an opinion is not any more valid than the fact it's based upon?

JUROR SEAT NO. 6: Right.

MR. WOLFSON: You don't have any concerns or problems about the concept of circumstantial evidence?

JUROR SEAT NO. 6: Nothing.

MR. WOLFSON: And you also believe that in judging a case you'll apply or can apply the standard which is proof beyond a reasonable doubt?

JUROR SEAT NO. 6: Yes, sir.

MR. WOLFSON: And have you sat on a jury before?

JUROR SEAT NO. 6: Yes.

MR. WOLFSON: Was that here in Nevada County?

JUROR SEAT NO. 6: One in Nevada County and one in Lassen County.

MR. WOLFSON: How long ago was that?

JUROR SEAT NO. 6: One in Nevada County's was either '91 or '92. And the one in Lassen County was some time in the early eighties.

MR. WOLFSON: '91 or '92?

JUROR SEAT NO. 6: Yes.

MR. WOLFSON: So we got you again this quickly?

JUROR SEAT NO. 6: Yes.

MR. WOLFSON: Was that a civil or criminal trial?

JUROR SEAT NO. 6: Civil. It was a wrongful death suit.

THE COURT: The question is No. 32 if you're looking counsel. Quite a few of them there.

MR. WOLFSON: Oh, I see. There was a standard of proof in that case of a preponderance of the evidence.

JUROR SEAT NO. 6: Yes, there was.

MR. WOLFSON: In a criminal case the standard of proof is -- guilt phase -- is higher. It's beyond a reasonable doubt.

JUROR SEAT NO. 6: Yes.

MR. WOLFSON: And do you think you could put aside the standard of proof that, at least for the guilt phase, that you utilized in the prior jury duty?

JUROR SEAT NO. 6: Sure.

MR. WOLFSON: And apply the beyond a reasonable doubt standard?

JUROR SEAT NO. 6: Yes.

MR. WOLFSON: And then if this case goes to a sanity phase, the burden shifts from the People to the defendant to prove that he was not sane at the time of the commission of the offense. And we go back to the preponderance of the evidence standard of proof. Do you think you could make that shift again?

JUROR SEAT NO. 6: Yes, I could.

MR. WOLFSON: You work for Nevada County as a building inspector?

JUROR SEAT NO. 6: Yes.

MR. WOLFSON: And is there anything about your employment with the county that makes you feel you could not be fair or impartial to either side?

JUROR SEAT NO. 6: No.

MR. WOLFSON: Thank you very much.

Hello, Mr. Keith. How are you today?

JUROR SEAT NO. 7: Good.

MR. WOLFSON: I have a note that says see 57. We have talked about 57 before. Okay. You answered 57 being do you have any feeling that a person who kills his own child must necessarily be mentally ill or crazy. And the you answered no, but you said if yes, explain. You did go on and explain. Not necessarily ill or crazy, but mental or emotional stability or stress must be a component. Not to say it's a valid component. Could you --

JUROR SEAT NO. 7: Well, it would seem that on the surface at least that it's an irrational act. And, you know, the question was a very difficult one to answer. I spent a lot of time on it. And in fact had to go back to it a couple of times. But the definitions that were listed in the question were very narrow, mentally ill or crazy. And neither of those were defined. As I say, on the surface it is an irrational act. And so rationality certainly is a component. But just on the basis of the question, I mean that's literally as candidly as I can answer it.

MR. WOLFSON: But at the same time would you connect either a feeling that the person must be either legally insane or something so wrong with him that he couldn't plan or deliberate or carry out an intent or have an intent because he committed an irrational act?

THE COURT: Let me ask a question, Mr. Keith. Do you believe that say, for example, a drive by shooting into a house is an irrational act?

JUROR SEAT NO. 7: Absolutely.

THE COURT: Okay. So would you believe that any person who was found to have engaged in a drive by shooting would necessarily be insane in the legal sense?

JUROR SEAT NO. 7: Not necessarily.

THE COURT: They could be correct --

JUROR SEAT NO. 7: But they could be.

THE COURT: Right. And are you saying I think what Ms. Vaughn said also -- I think it was Ms. Vaughn -- that parents being -- maybe Mr. Ford also -- that when you're a parent, you don't normally conceive of the notion that a parent could take the life of their own child under normal circumstances certainly. And I don't think anybody is here claiming that this is a normal circumstance. I think the question focuses though on the question of would you assume just by the fact that it is what does not appear on the surface to be a very rational act that it necessarily was the product of an insane person, an insane mental state?

JUROR SEAT NO. 7: Not necessarily.

THE COURT: Mr. Wolfson.

MR. WOLFSON: Okay. And in fact you can almost see a continuum of irrationality where perhaps you can explain why a person might be engaged in a drive by shooting as His Honor mentioned. It might be a battle over turf or the ability to sell drugs in a neighborhood or whatever, or revenge. But if you start going toward killing one's own child, the rationality starts or irrational starts become greater?

JUROR SEAT NO. 7: Well, as just stated in that example, you say you might be able to rationalize based on a drug turf or something else. That might be a rationalization. But as I indicated they're not necessarily a valid rationalization.

MR. WOLFSON: And in fact there might be -- and we get into the area of motive that I haven't touched on yet. Would you expect the People to, before you could make a finding of guilt, if you found all the other elements that you're instructed were present and you were instructed that motive is not an element, would you be able to make a finding of guilt if you could not ascertain or felt the People could not prove a motive?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: If motive is not -- you will be instructed motive is not an element of a crime.

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: Sometimes helps explain. Can you see that a person might be so upset or depressed or bothered or sick of what's happening in their life that they might want to end their own life and still be sane?

JUROR SEAT NO. 7: I could conceive of that, yes.

MR. WOLFSON: And could you conceive that the person might want to take somebody with him or her?

JUROR SEAT NO. 7: I can conceive of that, yes.

MR. WOLFSON: And would that make -- would you feel that that's an -- would that by itself is enough to make you believe a person is either insane or mentally ill?

JUROR SEAT NO. 7: No.

MR. WOLFSON: Since we're on rationality, if the apparent -- if there is an apparent motive and the apparent motive in itself seemed not rational, but you believed the person understood what they were doing and could distinguish right from wrong; in other words, knew the act was wrong, would you have trouble finding that person sane?

JUROR SEAT NO. 7: No.

MR. WOLFSON: It was a totally irrational reason for doing something?

JUROR SEAT NO. 7: No. As I say, a rational basis is not necessarily a valid one.

MR. WOLFSON: Thank you. My apologies for the seeming slowness that we go through these. We don't use them in every case. They add a little bit of cumbersomeness to what we're doing. But in the end I believe they save time and give us the opportunity for a better result. Thank you, Mr. Keith.

JUROR SEAT NO. 10: Excuse me.

THE COURT: We're going to take a short break in just a couple minutes to give everyone a chance to stretch their legs and get a drink of water. I was going to let one more person be questioned, and then we're going to take the break. So be just a moment.

MR. WOLFSON: I'll try.

THE COURT: Unless there is immediate need. If there is a need.

JUROR SEAT NO. 10: No, it's just I didn't want to get down to me and not be able to.

MR. WOLFSON: Getting close though, did I?

JUROR SEAT NO. 8: That's right.

MR. WOLFSON: And can you hear me all right? You also work for the county. That in itself would that make you feel like you have to support another county office and vote the way the district attorney would be asking you to vote just because you work for the county?

JUROR SEAT NO. 8: No.

MR. WOLFSON: You can be fair and impartial for the defendant's position?

MR. WOLFSON: You don't know anybody who is listed as a potential witness in the case?

JUROR SEAT NO. 8: No.

MR. WOLFSON: But you saw the list.

JUROR SEAT NO. 8: (Nods affirmatively).

MR. WOLFSON: That didn't scare you off, numbers?

JUROR SEAT NO. 8: (Nods negatively).

MR. WOLFSON: Apparently your brother's home was burglarized last month?

JUROR SEAT NO. 8: (Nods affirmatively).

MR. WOLFSON: Was that here in Nevada County?

JUROR SEAT NO. 8: That was in Yuba County.

MR. WOLFSON: There is nothing about that incident that leads you to leave that you can't be fair or impartial?

JUROR SEAT NO. 8: (Nods negatively).

MR. WOLFSON: And apparently you have served on a jury in the past?

JUROR SEAT NO. 8: That's right.

MR. WOLFSON: How long ago was that?

JUROR SEAT NO. 8: Oh, '89, '90 maybe.

MR. WOLFSON: In this county?

JUROR SEAT NO. 8: Yes.

MR. WOLFSON: That involved a child -- unlawful taking of a child by a parent?

JUROR SEAT NO. 8: That's right.

MR. WOLFSON: And I know His Honor probably was in a different role in that case.

JUROR SEAT NO. 8: That's right. He was the prosecutor.

MR. WOLFSON: Is there anything about that service -- it says you were ambivalent as to your feelings about it. Could you explain that?

JUROR SEAT NO. 8: Well, actually, I wanted to let the guy go, but you know he broke the law and he had other choices. And we convicted him.

MR. WOLFSON: Basically what you did is follow the instructions and base your verdict on what the facts you heard and saw?

JUROR SEAT NO. 8: That's right.

MR. WOLFSON: Put your own personal feelings aside?

JUROR SEAT NO. 8: That's right.

MR. WOLFSON: Something that we would ask you to do if you're chosen as a juror in this case.

JUROR SEAT NO. 8: I try.

MR. WOLFSON: And you feel you still could do it?

JUROR SEAT NO. 8: Yes.

MR. WOLFSON: You have no problem with the concept of circumstantial evidence?

JUROR SEAT NO. 8: No.

MR. WOLFSON: And you don't believe psychological tests are infallible or always correct?

JUROR SEAT NO. 8: That's correct.

MR. WOLFSON: And apparently you agree that doctors can diagnose the same individual or illness different ways?

JUROR SEAT NO. 8: (Nods affirmatively).

MR. WOLFSON: After hearing the responses from the other potential jurors regarding question 57, I note that you answered no. Do you have any reason to change your answer?

JUROR SEAT NO. 8: No.

MR. WOLFSON: So you agree that a person may not be mentally ill or crazy even if they commit a irrational and seemingly crazy act?

JUROR SEAT NO. 8: I agree that, yeah, it might not be directly interrelated or connected.

MR. WOLFSON: And you would allow or would follow the instruction regarding insanity and understand it's a legal term, not a medical term?

JUROR SEAT NO. 8: Yes.

MR. WOLFSON: Different than mentally ill, crazy, defect or disease?

JUROR SEAT NO. 8: Yes.

MR. WOLFSON: I don't want to hold everybody up. The break is coming. Thank you very much.

THE COURT: All right, ladies and gentlemen, we're going to take a brief recess because even though it's late in the day, I want to get at least through all of the prospective jurors that are in the jury box now by both attorneys, if possible. We're still going to -- we're going to take about a 10-minute recess. We'll be back here about 20 minutes of four. I anticipate we'll go for another 45 or 50 minutes and then take the afternoon recess. Then come back tomorrow morning at 9:30 so we have time to get everything squared away and get started hopefully promptly at 9:30. So take about a 10-minute recess. The bailiff will come and call you and we'll proceed. All of you who are in the jury box right now resume the same seats you're in when we come back, please.

(Brief recess taken)

THE COURT: Let's see. All right. Ms. Freeman. Stand right there. What's the nature of the problem?

JUROR: I need to go and pick my kids up.

THE COURT: Oh, you didn't find anybody?

JUROR: Huh-uh. I mean I have somebody picking them up, but I need to get them back to my house.

THE COURT: Oh, I see. All right. I think you have indicated also that you have a problem, same

problem Mr. Reed had as far as the insanity defense. Do counsel stipulate to excuse?

MR. WOLFSON: Stipulate, Your Honor. We just did.

THE COURT: All right, you're excused. Thank you. Yes, sir?

JUROR: Your Honor, my name is Richard Black, and I am unavailable tomorrow. I have reservations at a seminar that I have had paid for some time. Cost me nearly 2,000 dollars. It's not offered again. And I am unavailable tomorrow. I'm available for the rest of the days of trial, but I'm unavailable tomorrow.

THE COURT: Number 20.

MR. WOLFSON: Well, we could do this. Perhaps Mr. Black could call back and find out whether or not another panel is being brought in on Tuesday. If that be the case, if he doesn't have any other problems for any other days and he's needed at that time.

THE COURT: We could do that if you want.

MR. HUMPHREYS: Or if we're not done, he could just be dropped to the bottom of this list.

THE COURT: That's not.

JUROR: That's fine. The rest of the dates are no problem.

THE COURT: I know he can't come tomorrow. It's not necessarily -- even though he doesn't hear the whole voir dire, he can still be individually voir dired, if necessary, if we need him because we are out of jurors. So I would suggest that what you do is you call the clerk's office next Monday to see if you're needed next Tuesday or on the first of December, either date. All right. You'll be excused for tomorrow, but not excused from jury service entirely.

JUROR: Yes, that's fine. I have no problem with the other.

THE COURT: Very well then. We'll do that?

JUROR: Your Honor, my name is Elizabeth Speck. And I have a 12:15 appointment tomorrow that I must keep.

THE COURT: How long will it last?

JUROR: It's for a permanent at the beauty shop. And my lady's having a baby any day, so this is my last chance before the holidays.

THE COURT: All right. If we were to recess from 12 to two o'clock, do you think that would be a sufficient amount of time?

JUROR: No, I have to drive to Combie and 49. That takes a couple of hours. And.

THE COURT: Why don't we do the same thing with you we just did with the last gentleman then. That's we'll excuse you tomorrow. And you'll call the clerk's office Monday to see if you're needed on Tuesday, which would be the 23rd, or if you'll be needed on the first of December. Maybe we'll get a jury without needing to have you come back. But if we do need you, we'll let you know. The number is 50.

MR. HUMPHREYS: Your Honor, may Mr. Wolfson and I approach the bench?

THE COURT: Yes.

(Discussion off the record)

THE COURT: All right. Will be in session in People versus Patterson. The record will reflect the defendant is present with counsel. You may proceed, Mr. Wolfson.

MR. WOLFSON: Thank you, Your Honor. Ms. Rolder?

JUROR SEAT NO. 9: Right.

MR. WOLFSON: Pronounced correctly.

JUROR SEAT NO. 9: Ro-late-er.

MR. WOLFSON: I'm sorry. Welcome to Nevada County. I see that you have been here six months.

JUROR SEAT NO. 9: Longer, but in location six months.

MR. WOLFSON: And your husband is apparently pastor of a local church.

JUROR SEAT NO. 9: Right. Temporary. He's retired.

MR. WOLFSON: I see. You said that you have been called for jury duty before. But because ofyour husband's occupation I guess it was, right? Is there something that you connect with your husband's occupation and the fact that you haven't been allowed to serve on a jury or haven't served on a jury?

JUROR SEAT NO. 9: I carry a stigma.

MR. WOLFSON: You think.

JUROR SEAT NO. 9: Well, it seems so because I have been in three jury pools. And when they find out my husband's occupation, they ask me to step down. It just has so happened.

MR. WOLFSON: Hasn't been in this county?

JUROR SEAT NO. 9: Not yet.

MR. WOLFSON: You also indicate when asked question 20 is do you believe you would not be morally or philosophically able to make a decision in this case. You answered yes. Then said tend to be somewhat indecisive, probably sympathetic. And am in an exhausted state at this particular time. You basically don't think -- let me back up a minute. In order to be a juror you have to of course listen to the evidence.

JUROR SEAT NO. 9: Right.

MR. WOLFSON: And you have to listen to the law. And you are passing judgment --

JUROR SEAT NO. 9: True.

MR. WOLFSON: -- on a case. And is that something that you feel that either morally or philosophically you might have a problem doing?

JUROR SEAT NO. 9: Probably more capability at this point.

MR. WOLFSON: Just basically because you're --

JUROR SEAT NO. 9: Exhausted.

MR. WOLFSON: Do you think you just aren't physically able to serve on the jury right now?

JUROR SEAT NO. 9: I would say that, yes.

THE COURT: Mr. Humphreys, any questions?

MR. HUMPHREYS: No questions.

THE COURT: All right. Then I think at this time, Ms. Rolder, we'll excuse you. And maybe another time.

JUROR SEAT NO. 9: Thank you.

THE COURT: Thank you for coming. All right. Madam Clerk, I think you ought to fill -- first of all, I realize we didn't fill Ms. Freeman's spot, so let's fill that next, and then let's.

THE CLERK: Kenneth Baldwin.

THE COURT: Mr. Baldwin, just take that first vacant seat right there. Thank you.

THE CLERK: Robert Dahl.

THE COURT: All right. Just one second. Mr. Baldwin and Mr. Dahl, you have heard the questions that have been asked so far by the attorney Mr. Wolfson so far, and by myself. Are there any specifically you would want to comment on other than those that are in the questionnaire that he's going to get to in a minute. Is there anything else you can think of at this point that I should know about or the attorneys should know about about your ability to serve as a juror in this case?

JUROR SEAT NO. 9: No.

JUROR SEAT NO. 12: (Nods negatively).

THE COURT: All right. Then, Mr. Wolfson, you may start with Mr. Dahl. Well, Mr. Baldwin is now in the end, so we'll get to him I'm sure.

MR. HUMPHREYS: You're Mr. Dahl?

THE COURT: You got them backwards. I don't care. It's up to you. Do them in whichever order you wish.

MR. WOLFSON: Okay.

MR. WOLFSON: If I could just have a second. How are you today, Mr. Dahl?

JUROR SEAT NO. 9: Fine.

MR. WOLFSON: You have a relative in the Sheriff's Department.

JUROR SEAT NO. 9: Yes.

MR. WOLFSON: Is that here locally?

JUROR SEAT NO. 9: No.

MR. WOLFSON: Where is that?

JUROR SEAT NO. 9: Minnesota.

MR. WOLFSON: And is there anything about your relationship with that relative that would lead you to feel you couldn't be fair or impartial to either side in this case?

JUROR SEAT NO. 9: I don't think so.

MR. WOLFSON: Don't mean to laugh. It says how do you feel about jury service? Long, boring. Do you think that are you able to -- there will be probably between both phases of the trial at least nine days. That will be over three weeks. Would you be able to serve that period of time?

JUROR SEAT NO. 9: I would if I had to.

MR. WOLFSON: And you're not alone in your opinion.

THE COURT: All you have to do is read peanuts cartoons if you want to see. I think Snoopy once asked Woodstock in a cartoon, you know what jury service is all about, don't you? That's where you sit around all day and nothing happens. And then you go home. So in this case we're beyond that point. You have actually gotten to the jury box. So we're ahead of the game.

MR. WOLFSON: Okay. Yeah. You don't believe that philosophically or morally you can make a decision. You felt that a person is guilty when that person commits a crime. I'm prosecuting the case on behalf of the district attorney's office. And I'm asking you to be fair and impartial and set any preconceived ideas you might have about the case. You don't know anything about it, you haven't read anything about it, I'm assuming?

JUROR SEAT NO. 9: Just of the -- just what I read in the paper a few months or whenever it happened.

MR. WOLFSON: But are you willing to set aside what you read and listen to the evidence and that is presented by both sides, and the law that is read to you by His Honor, and base your verdict or your decision on what you hear in the courtroom?

JUROR SEAT NO. 9: Well, that's a tough decision.

MR. WOLFSON: I understand. A person is not -- there is a presumption. I mentioned a presumption before. The presumption I mentioned before had had we're talking about two phases, the guilt phase and a sanity phase. Was that during the guilt phase, even though you might hear some testimony that in some doctor's opinion or you might even hear some facts that might lead you to believe that a person has a mental problem or might even lead you to believe that that mental problem approaches -- and we're talking hypothetically now -- legal insanity, you are to presume that that person is sane for the guilt phase.

JUROR SEAT NO. 9: Right.

MR. WOLFSON: You're also to presume in the guilt phase that that person is not guilty. And you're under the law to hold me to a burden of proof that I prove that person guilty beyond a reasonable doubt. That instruction will be read to you when we're talking about reasonable doubt, not all possible doubt. But can you -- and I'm asking you as as His Honor and counsel for the defense to simply follow the law which are preconceived idea that if somebody is charged he must be guilty aside. Do you think you can do that?

JUROR SEAT NO. 9: Not really.

MR. WOLFSON: Your Honor, I'm.

THE COURT: Let me ask a question just briefly. Sir, I think one of the problems we run into often in this area of the law in this area of the voir dire in the questions is that -- they have improved the radios for the deputies. So you'll have to bare.

MR. WOLFSON: They took off the volume control.

THE COURT: That's right. Most people I think naturally assume that prosecutors don't go around looking for people to prosecute. That law enforcement officers don't go around looking for people to prosecute. Most of us I think normally and reasonably assume that if someone is charged with an offense, there must be some evidence that they did something. The question is in our system of law every person who is charged with an offense

is still entitled to have the judgment of a jury of 12 people after consideration of all of the evidence and the law making that determination. Not based on the fact there is a piece of paper that alleges that they did something or even that there is a police officer that thinks they did something and testifies in court. You have to look at all of the evidence. And you cannot assume someone is guilty under our system simply because there is a piece of paper that says we allege on a certain date they did something. Do you feel as you sit here today -- there is one other factor that's very important in our system of justice. And that is that every accused person, any one of you if you were accused of something I would assume would want to have this presumption of innocence and require the state to prove that you did something wrong. And so at this point in time you have heard no evidence. If the 12 of you were asked to go out right now and make a decision on whether Mr. Patterson did anything or not, you would have to find him not guilty right now because there isn't one shred of evidence that he did anything that you have heard. Do you understand that that's the concept?

JUROR SEAT NO. 9: Yes.

THE COURT: Do you feel now understanding that that's the concept that you can accept that and make the decision of this case on the evidence, or do you still feel that you have formed an opinion about his guilt that you cannot set aside?

JUROR SEAT NO. 9: I feel I already have an opinion.

THE COURT: You feel you have already fixed an opinion?

JUROR SEAT NO. 9: Yes.

THE COURT: And there isn't anything we can do that would change it at this point?

JUROR SEAT NO. 9: No.

THE COURT: All right. I'm excusing Mr. Dahl. Thank you for your candor. Madam Clerk, juror number 17.

THE CLERK: Wayne Art Wagner.

THE COURT: I guess I'll start with you, Mr. Wagner, where we left off with Mr. Dahl. Do you feel that after hearing my explanation and counsel's explanation about the presumption of innocence that you would at this point presume Mr. Patterson to be innocent until the evidence is proven by the People, the evidence proves beyond a reasonable doubt that he is in fact guilty?

JUROR SEAT NO. 9: Yes, I would.

THE COURT: All right. Mr. Wolfson, you may proceed then if you had a chance to look at his questionnaire.

MR. WOLFSON: In other words, you're going to hold the People to their burden of proof through the guilt phase?

JUROR SEAT NO. 9: Yes.

MR. WOLFSON: But you're going to follow the instructions that have you presume during the guilt phase that the defendant is sane even though you might hear psychiatric testimony.

JUROR SEAT NO. 9: I think so.

THE COURT: You understood the statement I made earlier that in the guilt phase there is a presumption of sanity even though there may be evidence about mental disease or defect in the guilt phase of the trial. You still presume sanity until you get to the point of having to decide if there is -- if the plea of not guilty by reason of insanity should be.

JUROR SEAT NO. 9: Yes, I think we're dealing with two issues.

THE COURT: Two separate ones, right.

MR. WOLFSON: And, in fact, in the sanity phase if there should be one, it's the burden is on the defendant to prove he was legally insane at the time of the commission of the crime by a preponderance of the evidence. In other words it shifts. And he has to prove that he was insane.

JUROR SEAT NO. 9: I understand.

MR. WOLFSON: Would you be able to follow that instruction and allow the burden to shift and make him prove by a preponderance of the evidence?

JUROR SEAT NO. 9: Yes.

MR. WOLFSON: Let me take a quick look.

THE COURT: You want to see question 57.

MR. WOLFSON: We all react when we heard the offense charged. And you have heard some folks believe that there must be something wrong with a person to extent they might be mentally ill or crazy if they do kill their own child. You answered no. Have you heard anything that changes that opinion?

JUROR SEAT NO. 9: No, because I took the question literally. I looked at accidental death.

MR. WOLFSON: Okay. I don't think there is any -- as His Honor indicated, and I don't know if defense counsel has an objection to what I'm going to say. He'll voice it. But let's just go on. There is no great mystery here. The evidence -- let's assume the evidence shows that the death was not accidental. That there was an act, not accidental act, that resulted in the killing of the child. Let's even assume the evidence showed that the act was intentional. Would that change your answer to question 57?

JUROR SEAT NO. 9: No, I don't think so.

MR. WOLFSON: You basically agree that a person might have a motive -- may not even have a motive, but might commit an act that on its face the act seems crazy, irrational, but still the person himself who commits the act is not crazy or irrational?

JUROR SEAT NO. 9: Yes, I believe --

THE COURT: Actually, I think we ought to not use the word crazy because I think all it does is add further confusion. The concepts we're dealing with here are legal insanity versus all of the other possibilities. Now, if you're asking people the term crazy is a term that we use just like in the -- we use the term drunk in the crime drunk driving. There is no requirement that someone be drunk to be guilty of the offense we call drunk driving just like

there is no requirement that someone be crazy. Because there is no legal definition of the term crazy. But a lot of us use the term crazy.

So the reason is the prosecutor is asking you about it I think is to distinguish the fact that we think of a lot of things as being crazy that are done by people that may or may not be insane. So we have to keep these concepts somewhat distinguished. And I think if we're using the term crazy in the colloquial sense, that's one thing. But if we're using it in the sense of a legal term, it isn't. So I think that's as long as we keep that straight for all of you, I think it will be not a problem.

MR. WOLFSON: We used it in the question.

THE COURT: I know it's in the question. And I don't think it's used in the legal sense, but maybe.

MR. WOLFSON: We're not using mentally ill. We're not using mental defect, mental disease which are medical terms. In a legal sense. And we're not and crazy is not a legal or medical term as His Honor indicated. It's a term of common usage.

The next question addresses the issue of the difference between mentally ill and mental disease, defects, psychosis, psychotic. We also talk about paranoia, paranoid disorder, schizophrenic, bipolar disorder which is manic-depressive. You might even hear the term psychoses or psychotic disorder not otherwise specified. All those are medical terms. And if you believed that those any one of those or another condition existed, but didn't believe that the legal definition of insanity was proven, would you be able to separate the concepts?

JUROR SEAT NO. 9: Yeah, I think I could.

MR. WOLFSON: And you also agree that psychiatrists like other professionals or other experts differ in their opinions?

JUROR SEAT NO. 9: Yes.

MR. WOLFSON: And would you look at the reason for the opinion, the facts behind the opinion before you followed an opinion?

JUROR SEAT NO. 9: Yes, I think so.

MR. WOLFSON: All right. I have nothing further.

THE COURT: All right. You may go to the next.

MR. WOLFSON: Ms. Reckner.

JUROR NO. 10: Yes.

MR. WOLFSON: Do you have any trouble hearing me? I tend to drop off too.

JUROR NO. 10: No.

MR. WOLFSON: You believe you might have trouble reaching a verdict?

JUROR SEAT NO. 10: Well, at the time -- this is the first time I've been approached to serve as a juror. It's the first time I ever heard any question like that that's ever been presented to me. And to be true to myself and all concerned, it's not something that I could quickly write down and say yes, okay. I need, I needed that hour-and-a-half to think about that.

MR. WOLFSON: Sure. We appreciate your candor, first of all. Secondly, your reaction is not an unusual one. You really don't know as His Honor indicated what you're going to be hearing.

JUROR SEAT NO. 10: Yeah.

MS. WELLNER: I don't know what the expectation was, and I didn't understand the word tools.

MR. WOLFSON: You don't know what the trial is going to consist of -- of evidence, the law. What we're interested in very specifically is do you belong to any group or organization or have any philosophical belief that would not allow you to reach a verdict or pass judgment on another person?

JUROR SEAT NO. 10: No, now that I know that you provide -- the system provides the tools.

MR. WOLFSON: Tools be the evidence?

JUROR SEAT NO. 10: Yes, that's right.

MR. WOLFSON: And the law. And once you hear the law which you hear from His Honor when the evidence comes from the witness stand.

JUROR SEAT NO. 10: And I apply and weed out.

MR. WOLFSON: And I asked in question 19 and 20, you said I'm sure. When I asked you about religious

organization or group, you also said I'm sure. But do you know what I mean more specifically or we mean more specifically now?

JUROR SEAT NO. 10: I beg your pardon?

MR. WOLFSON: The question was do you belong to any religious organization or group that would prevent you from being able to decide this case.

JUROR SEAT NO. 10: No. Did I say on my thing yes?

MR. WOLFSON: Yes.

JUROR SEAT NO. 10: Oops.

THE COURT: You said I'm sure.

JUROR SEAT NO. 10: Sorry.

MR. WOLFSON: You studied psychology in college?

JUROR SEAT NO. 10: Yes, just like the other gentleman said. It's mandatory as far as trying to get a degree.

MR. WOLFSON: And there is nothing about that prior experience that you think would carry over to this?

JUROR SEAT NO. 10: Not many years ago.

MR. WOLFSON: Is there anything you have heard in our discussion either amongst His Honor, defense counsel, myself or questions to other jurors that you might want to bring up that has raised some issue in your mind or some concern or thought?

JUROR SEAT NO. 10: No.

MR. WOLFSON: I note in question 74 which talks about the standard of proof in any criminal case is beyond a reasonable doubt being the same for a murder case as for a simple trespass or other charged crime, you answered unsure at this time. And the question was occasionally some jurors believe the standard in a murder case should be higher because the consequences of a conviction may be serious. As I have said, however, the standard is no higher than in any other criminal case. Do you think it should be -- and that raises a couple of points that probably need to be made. One is, and I think it was pointed out by His Honor, this is not a capital case.

JUROR SEAT NO. 10: I read that down further. But I had already marked it.

MR. WOLFSON: I see. And penalty is not something that jurors consider.

THE COURT: In fact, there is a specific instruction that you're not to consider penalty in a case of this kind at all.

JUROR SEAT NO. 10: Well, I got that down wordy and got kind of scribbling things up.

MR. WOLFSON: That's okay. That's why the questionnaires are given to you. We talk about the burden of proof being beyond a reasonable doubt to a moral certainty. It's the same in a murder case as indicated in question as in a shoplift, trespass or in anything or any other criminal case. And it isn't beyond all doubt. It's reasonable doubt. And you will be read the instruction. Do you believe you can follow it?

JUROR SEAT NO. 10: Yes.

MR. WOLFSON: Great. All right. Thank you very much.

MR. WOLFSON: Ms. Severns. Have you heard anything about or seen anything on the news about the case.

JUROR SEAT NO. 11: (Nods negatively).

MR. WOLFSON: Have you heard anything in the questions I have asked or the discussions we have had which has made you feel that you might want to make us aware of something, some concern that's been raised.

JUROR SEAT NO. 11: No.

MR. WOLFSON: You apparently have a background through some schooling and also some employment in -- or maybe it was schooling -- psychiatric nursing. Was it schooling.

JUROR SEAT NO. 11: I'm a registered nurse. Part of becoming a registered nurse you have to have a semester in psychiatric, so I have had a semester of psychiatric nursing training.

MR. WOLFSON: And in your employment of psychiatric issues you have concerns dealing with patients and mental well-being?

JUROR SEAT NO. 11: I think any kind of good nursing you worry about psychosocial issues. I have never worked in a psychiatric unit.

MR. WOLFSON: But as a nurse you are trained to watch for psychiatric problems to make doctors aware or make other nursing staff aware or and you're dealing with a patient.

JUROR SEAT NO. 11: I would think so, yes.

MR. WOLFSON: Are you employed currently as a nurse?

JUROR SEAT NO. 11: I work for the state Licensing Certification Department.

MR. WOLFSON: For nurses?

JUROR SEAT NO. 11: Departmental service. We license medical facilities.

MR. WOLFSON: In your working as a nurse or so -- actually, do you have to be a registered nurse in order to work in the occupation you work in?

JUROR SEAT NO. 11: The bulk, about three quarters of the people that work in my office are registered nurses. We have sanitarians, dieticians, physicians. Most of them registered nurses, yes.

MR. WOLFSON: Do you recognize there is a difference between mental disease or disorder and the legal definition of insanity?

JUROR SEAT NO. 11: Yes.

MR. WOLFSON: Do you have any problem with that concept?

JUROR SEAT NO. 11: No.

MR. WOLFSON: Do you -- there may be evidence that a factor in the case that we're concerned with is depression or manic depression, manic-depressive disorder. Is there anything about that that might -- are you predisposed in any way if that be some of the evidence to apply -- let me back up a minute. I believe

through your training you know that depression is a mental disorder?

JUROR SEAT NO. 11: Yes.

MR. WOLFSON: And if there is evidence that the depression is a factor in what occurred that brought us all here which led to the alleged offense, would you be able to set aside medical evidence of depression and judge the case on the facts and the law and utilize the legal definition of insanity?

JUROR SEAT NO. 11: You're going to give me medical evidence of depression?

MR. WOLFSON: If there is evidence of depression is a factor or was a factor in the offense, would you be able to either set that aside or follow the law as it applies to the legal definition of insanity?

JUROR SEAT NO. 11: Well, I'm in the court judging the legal evidence and sanity. If the judge is the right word, I think that's what I look at. I'm not quite sure I'm getting the question here.

MR. WOLFSON: That's myself, I'm not making myself clear enough. You have had experience in the past with people who were depressed or in a depressed state and treated for depression. Does that experience lead you to believe that a just knowing what you know through your experience and education and working as a nurse and any other way, does that in itself lead you to believe that in a depressed person or a person who is diagnosed as depressed and mentally ill either should not be accountable for his or her actions, or the thought process is such that they might not be able to plan or carry out a scheme?

JUROR SEAT NO. 11: No.

MR. WOLFSON: You understand what I mean now?

JUROR SEAT NO. 11: It's almost like is a diagnosis of depression an excuse for an action.

MR. WOLFSON: Right.

JUROR SEAT NO. 11: And I don't think so.

MR. WOLFSON: And in your experience as opposed to what you might hear in the form of evidence, do you believe that a person who might be clinically depressed cannot distinguish either right or wrong or understand the nature and quality of an act or plan or scheme or do something they intend to do or form an intent?

THE COURT: It seems to me we're talking about a matter of degree. I think the real question is the degree. I think the question is would you automatically assume that because someone has a label as being diagnosed as depressed that they necessarily are a person who would be unable to do what Mr. Wolfson is saying, that is formulate plans?

JUROR SEAT NO. 11: There is all different degrees of depression. And from the blues to catatonic state. And I think it would have to be what the situation was.

THE COURT: You would have to evaluate.

JUROR SEAT NO. 11: I don't think I would take my medical knowledge and put in as evidence or make a prejudged determination because of my medical knowledge compared to what the evidence is being shown.

THE COURT: That's the important thing. You don't have to leave your common sense outside the door. But what we don't want is we don't want jurors who are saying, well, I know from my experience that, you know. And something that's completely contrary to what all the other jurors have heard in the evidence in the courtroom because that does nothing but confuse the issue. That's what we're trying to avoid. So you have indicated you can avoid doing that?

JUROR SEAT NO. 11: Yes.

MR. WOLFSON: Thank you very much, Mr. Baldwin.

How are you today?

JUROR SEAT NO. 12: Fine.

MR. WOLFSON: Just go to 57 and 58. I made a note. Okay. You answered 57 yes. Anyone -- and you answered it in the explanation. Anyone who can kill his

own child must have something wrong with him. Would you be able to explain further?

JUROR SEAT NO. 12: Well, it's -- to me it doesn't seem like a normal thing for a person to do. I didn't actually specify of mental illness or however. It just doesn't seem like a natural reaction.

MR. WOLFSON: But we all agree that killing anyone is.

JUROR SEAT NO. 12: Oh, yeah. I didn't mean to specify. But under that scenario, yeah, it does seem abnormal. I mean killing anybody is abnormal, but under that scenario.

MR. WOLFSON: If we again look at acts by degree, that act seems far more extreme than perhaps killing a stranger.

JUROR SEAT NO. 12: As far as degree, no.

MR. WOLFSON: Do you think then there automatically in your mind the person has to be mentally ill without hearing any other evidence?

JUROR SEAT NO. 12: Not necessarily.

MR. WOLFSON: So you would -- you could conceive that the person might -- in fact you left 58 blank. Insanity as referred to in this case is a legal term, not a medical term. Do you agree a person can be mentally ill and under the law not insane. You left it blank. Oh, I'm sorry, you said no, you don't agree. You don't agree. You think that a person is mentally ill and they automatically would be insane which is a legal term.

JUROR SEAT NO. 12: I think I had to come back to that question because I didn't quite understand it while I was going through it.

MR. WOLFSON: Your Honor, would it be appropriate at this time to read the jury instruction?

THE COURT: The M'Naghten instruction that defines legal insanity.

THE COURT: It might if you can tell me where it's been numbered by the editors CALJIC at this point.

MR. WOLFSON: It's toward the beginning.

MR. HUMPHREYS: Chapter six, I believe, Your Honor. Either six or four.

THE COURT: Six or five. Let's look at four here. It may be five, but it might be six. All right.

A person is legally insane when by reason of mental disease or mental defect he was incapable of knowing or understanding the nature and quality of his act or incapable of distinguishing right from wrong at the time of the commission of the crime. You may consider evidence of his mental condition before, during or after the time of the commission of the crime as tending to show the defendant's mental condition at the time the crime was committed.

Mental illness and mental abnormality in whatever form either may appear are not necessarily the same as legal insanity. A person may be mentally ill or mentally abnormal and yet not be legally insane. The defendant has the burden of proving his legal insanity at the time of the commission of the crime by a preponderance of the evidence. That's essentially the instruction.

MR. WOLFSON: As we discussed with other jurors for the guilt phase, there is a presumption of sanity. But if you are chosen as a juror in the trial goes on to a sanity phase, the burden shifts. You'll be hearing that phase. Or you'll be hearing that part of the trial. You have heard the instruction. Basically what it's saying is there defendant either did or did not understand the nature and quality of the act. In this case we're talking about killing a human being. We're saying in effect the defendant didn't understand what it meant to kill a human being and that a human being was being killed, or was not capable of distinguishing right from wrong at the time of the killing. That's as the instruction says is different than somebody suffering from mental disease or defect or mental abnormality.

Do you believe you can separate the concepts; in other words, you might be convinced that there is a mental defect, disease, abnormality, defendant psychotic or suffering from some form of mental disease. But if you

believed that the defendant understood the nature and quality of the act and could distinguish right from wrong, could you separate the two and make a finding based on the law?

JUROR SEAT NO. 12: After the definition, yeah.

MR. WOLFSON: Is there anything that was raised in questioning any of the other jurors that you might want to bring to our attention or the court's attention?

JUROR SEAT NO. 12: No, sir.

MR. WOLFSON: Thank you. I have nothing further.

THE COURT: Do you pass the 12 jurors for cause then at this point?

MR. WOLFSON: Yes, Your Honor, I do.

THE COURT: All right. It's now 4:30. I think it's probably a good time to take the evening recess. And we will start again tomorrow morning at 9:30 a.m. Mr. Humphreys will have a period of time, approximately I would imagine it will take him an hour maybe or so to go through the 12. Each attorney does not have to go and ask each of you individual questions. They may ask one some, they may ask another more. Don't assume anything if you're given the third degree and somebody else isn't. It's just a process that they're going through in order to try to pick 12 people that they feel can adequately and fairly try the case for both sides.

The other thing is I want to let you in the audience know is that once we get the 12 jurors, assuming we're able to do this tomorrow, we're also going to choose at least one and possibly two alternate jurors because of the nature of the case and the length of the case. People ask me sometimes why we choose alternate jurors. The primary reason is that if we did not choose any alternate jurors and one of the jurors in this case became ill three weeks into the trial and was unable to continue, we would have to dismiss the entire case and start all over. So that's the primary reason we have alternate is to step in in the event that one of the regular jurors can no longer complete their function.

So I know it's very warm in here. This is a small courtroom. It's fairly stuffy, so I will try to take frequent breaks. If during this process any of you start to nod off, have to stand up stretch your legs, raise your hand and let me know and I'll try to keep things so that everyone can stay as alert and as cool as possible.

Yes, sir?

JUROR: Have we selected a jury now? Is this it?

THE COURT: Oh, no. We have got awhile to go. We next go -- when both attorneys are finished asking, I'll tell you a little bit of the procedure. Each attorney gets to ask questions of the 12 jurors until we are left with 12 jurors in the jury position that both of them say I will pass for cause. That means they have found that there is no legal cause at that point to challenge any of the remaining jurors in the box. After that we start what's called the peremptory challenge system which is the magical part of jury selection and the mystical part of it for everyone who has watched it happen. Where attorneys essentially are allowed to excuse jurors without stating any legal cause or any reason. And we ask you not to speculate as to what the reasons are because sometimes you might try and you might be 180 degrees off. So that's where they each are allowed under the law 20 peremptory challenges. So if they were to exercise all 20 of them, we wouldn't have enough jurors to even finish the case right now. We would have to go out and get more.

JUROR: Have we used any of them?

THE COURT: No, not yet. We haven't even started that yet. So that's if you think you're going to get out immediately now, no. I would estimate from what I'm seen that we're looking at most of tomorrow to finish the jury selection; but hopefully we will finish it tomorrow and then start with the evidence on December 1st as I indicated.

So you're all excused at this time. I'm going to give you an admonition before any of you go anywhere. This trial may be covered by the news media. It may appear in The Union newspaper. I don't see any t.v. cameras

here so I doubt it's going to be on the evening news in Sacramento. But it may very well be covered in the news media. So starting from now do not read anything about the case. In fact, it would be a good idea if you have someone at home -- a significant other, a wife, a husband, a child, someone who can read -- to have them review the paper first and make sure there is nothing about any murder trial in Nevada City that's going on because we don't want any of you to read something in the newspaper that some reporter's analysis of what may have happened that turns out not to be accurate, number one; and, number two, might influence your judgment as a juror in the case. So from this point on do not discuss the case with anyone. Do not read about it. Make a conscious effort not to read about it in the paper. It's important to do that from now on. I believe there is one prospective juror we're going to ask to remain. Is there?

Then all of you in the audience are excused, and everyone except Mr. MacIntosh is excused. We're going to need one minute to talk to him. See you tomorrow morning at 9:30.

(Jurors are excused from the courtroom)

THE COURT: All right. The record will reflect we're out of the presence of all the other prospective jurors except Mr. MacIntosh. Mr. MacIntosh, I have met with the attorneys. And they have indicated that even though they're pretty well convinced that you're going to do your absolute best to keep any influence from your relationship with Ms. Hildebrandt to affect your judgment, and I'm sure that you could do that. They're both I think going to stipulate that you may nonetheless be excused because of the number of days this is going to go on. And the fact that it's anticipated that she may be given information about witnesses and other things that might -- she won't intentionally try to divulge to you, and I don't think you would intentionally try to get out of her. But I think that the attorneys just we deal with in the criminal system that so-called appearances as much as we deal with the realities. And I think the reality is there is no

problem, but the appearance might be that there is a problem. So the attorneys have both stipulated that you may be excused. I know you would rather be here than doing anything else in your life.

JUROR SEAT NO. 4: Oh, definitely.

THE COURT: But they are stipulating in this case at least that you're excused, and hopefully we'll get you again in another case of maybe a three day case or something like that where different situations exist. So you're free to go.

JUROR SEAT NO. 4: Thank you. Thank you. Thank you, gentlemen.

THE COURT: And that means the next juror will be number 18 which is Lauren Gramlish.

(Whereupon, the matter was adjourned)

November 19, 1993, Nevada City, California

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THE COURT: Court will be in session in People versus Patterson. The record will reflect the defendant is present with counsel. And the jurors are present. Madam Clerk, you may fill seat number four, please, at this time.

THE CLERK: Lauren Bramlick.

THE COURT: All right. Mr. Wolfson, you may briefly question Mr. Bramlick. First of all, I'll ask you, Mr. Bramlick, have you heard all the questions that have been asked so far?

JUROR SEAT NO. 4: Yes.

THE COURT: And were there any that you felt you specifically would want to comment upon if you were seated where you are that you can think of right now?

JUROR SEAT NO. 4: No.

THE COURT: All right. Mr. Wolfson, you may proceed.

MR. WOLFSON: Thank you, Your Honor.

MR. WOLFSON: Mr. Bramlick, this would be the first time if chosen as a juror?

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: You have heard the other questions, specifically the questions regarding? Circumstantial evidence.

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: Do you have any concerns about circumstantial evidence? No, I note you did not note anything on your questionnaire.

JUROR SEAT NO. 4: No, I have no concerns about that.

MR. WOLFSON: You agree and understand that in trying to determine a person's mental state or intent, sometimes you have to rely on circumstantial evidence?

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: Sometimes a person will tell you what they intend today do.

JUROR SEAT NO. 4: Uh-huh.

MR. WOLFSON: The question 57 that we have been concerned with dealing with a person's killing of his own or her own child. And the assumption that a person might be mentally ill, or to use the term crazy to do what we all agree would be a crazy or act. You have no concerns. You answered no. If I were to tell you that the evidence might show that the act was an intentional act, would that change your answer any?

JUROR SEAT NO. 4: I'm not --

MR. WOLFSON: You answered you didn't believe a person who kills his own child must necessarily be mentally or crazy.

JUROR SEAT NO. 4: That's correct.

MR. WOLFSON: A couple of folks who answered that question were making the assumptions that the facts or circumstances might be one of accident or self-defense or something of that nature. If I were to tell you that hypothetically or assume that the act was an intentional act would that change your answer.

JUROR SEAT NO. 4: No.

MR. WOLFSON: And you agree that a person can be mentally ill, and you have heard -- did you hear the instruction that His Honor read regarding legal insanity?

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: And do you recognize the difference?

JUROR SEAT NO. 4: Yes, I recognize that there is a difference.

MR. WOLFSON: Thank you. No further questions.

THE COURT: All right. You pass for cause?

MR. WOLFSON: I do, Your Honor.

THE COURT: All right. Mr. Humphreys, it's your turn.

MR. HUMPHREYS: Thank you. Ladies and gentlemen, one of the advantages to going second in this questioning process is that by the time I get up, Mr. Wolfson has covered a lot of the same areas that I would have gone over. And hopefully I can keep this brief.

The questionnaires that we gave you to fill out and the questions that we ask you here are basically designed to find out how you think. One course they don't teach in law school or med school or psychiatrists school for that matter is mind reading. We recognize that all of you come to court as potential jurors with various life experiences, and various outlooks on life. And what we're trying to find out basically is if any of your particular life experiences or outlooks on the issues we're dealing with would make it difficult for you to be fair and impartial in this case.

As Mr. Wolfson said and which I will repeat, both the People and Mr. Patterson are entitled to a jury of 12 people who can decide the case fairly and impartially. And, hopefully, we're moving along to that goal.

You have heard a little bit about some of the issues that may be involved in this case. Judge Darlington told you yesterday that this is not a who done it type of case. This is also not a -- not the type of case where there is going to be a dispute over the instrumentality that caused the death. What I anticipate will be in dispute, however,

will be, factually speaking, what led up to the events, what occurred after the events and what interpretation or what inferences, if you will, you may draw from those facts or events.

Is there any member of the panel who knowing that this case is not a who done it would have a difficult time deciding the other issues in the case fairly and impartially? Let me take it one step further. Mr. Patterson as the judge told you is charged with murder. Murder is a subcategory of a general category of crime called homicide. Homicide basically is the unlawful killing of a human being. No legal justification or excuse. In the various classes of homicide, murder being the more serious, whether a particular type of homicide is murder or some lesser degree of homicide depends on a jury's findings as to that individual's mental state. And I'm not talking about insanity at this point. There are mental elements involved in various types of homicide.

You have heard the term premeditation and deliberation. There is an additional term that will be defined for you at the appropriate point in the trial called malice aforethought. Knowing that this case is not a who done it, is there any member of the panel who feels that because there is not going to be a real issue on who did it, that would tend to -- I'm wording this rather badly. Let me try it again. Knowing that this case is not a who done it, is there anyone who would have difficulty keeping their mind open and impartial in terms of listening to the evidence that may have an impact on findings as to my client's particular mental state at the time? Is there anyone who could understand that question?

JUROR SEAT NO. 10: Yeah.

MR. HUMPHREYS: Well, that's reassuring. Thank you. I didn't see any response. We have been talking a little bit about the burden of proof also and the concept of proof beyond a reasonable doubt. And as you have been told, if we go to a sanity phase -- assuming there is a finding of guilt and assuming we go to a sanity phase -- the burden of proof switches to the defense to Mr.

Patterson. Because there is a presumption going in that he is sane. The burden of proof that the defense has at the sanity phase, however, is to prove Mr. Patterson is legally insane by a preponderance of the evidence.

Preponderance of the evidence will be defined for you at the appropriate time. But I will tell you at this point that it is a substantially less of a burden of proof than proof beyond a reasonable doubt. Are you with me so far? Okay. Is there anyone who has difficulty with the concept that Mr. Wolfson as the prosecutor has a burden of proof beyond a reasonable doubt at the guilt phase, but I would have a lesser burden of proof at the sanity phase. Is there anyone who has a problem with that difference in our respective burdens?

As you sit here today, is there anyone on the panel who would have difficulty applying that burden of proof to the defense assuming we reach the sanity phase? And I see no response.

Another issue I think I need to talk about. And I assume that all of you have seen Mr. Patterson enter and exit the courtroom exiting through the side door over there to Mr. Ford's right. And back behind there is a holding area for the jail. Mr. Patterson is in custody for this offense. I can say with pretty much assurance that at the conclusion of the case anyone selected to sit as a juror will receive an instruction that the fact that Mr. Patterson has been arrested for this offense, the fact that charges have been brought against him, the fact that he's on trial for this offense and the fact that he's in custody, none of these factors are evidence of his guilt and none of these factors may be considered by a juror in any way in deciding whether Mr. Patterson is guilty or not guilty. Is there anyone who would have difficulty following an instruction like that from the court? I see no response.

Is there anyone who tends to feel at this particular point that Mr. Patterson is more likely guilty than not guilty because he's been arrested, because he's been charged, because he's in custody? And I see no response. Thank you.

Now your role in this case you are the particular judges of the facts. You would be 12 individual judges of the facts who would meet during jury deliberations and hopefully be able to come to a unanimous agreement on what facts have been shown. Now we're going to be presenting evidence during the course of the trial. And at the conclusion of the trial Judge Darlington will give you a number of jury instructions that will be guidelines for judging or assessing the evidence that has been presented here in court. Some of the instructions that the judge gives you may not be applicable because whether a particular instruction applies sometimes depends on what facts a jury decides have been proven by the evidence. And no one in this courtroom -- not the judge, not Mr. Wolfson, not myself -- can tell a jury how to how to decide the facts in this case. Mr. Wolfson and I will argue at the conclusion of the case, I'm sure, as to what significance the facts -- what significance the evidence has, what facts have been proven and what inferences you can draw from that. But in terms of the actual process of deciding whether a witness is credible, whether the People have sustained their burden of proof, no one can tell you how to decide. Is there anyone who would be uncomfortable with the concept of a juror as being an individual judge of the facts? And I see no response. Thank you.

Mr. Wolfson touched on one area yesterday of the motive is not an element of the crime. That's true in just about every case in California. Motive is not something that Mr. Wolfson has to prove to you. However, I anticipate an instruction will be given to you that tells you that the presence or absence of motive may be considered by you in deciding whether Mr. Patterson is guilty or not guilty. That is the presence of motive, if you find presence of such a motive may be a factor that points towards guilt. On the other hand, the absence of motive can be a factor that points towards not guilty. Does everybody understand that? Would anybody have a problem following an instruction such as that? And I see no response. Thank you.

Now in the questionnaires you filled out for us we asked you a number of different questions about psychiatry, psychologists. And your views towards psychiatric evidence. And I suppose that there can be two diametrically opposed views of doctors and psychiatrists in general. One of them is the doctor is God theory which says doctors can do no wrong. The other I suppose would be a doctor, or in this particular case a psychiatrist, well they're nothing but a bunch of quacks. Those are two extremes. If any of you have relatives in the -- any of you in the audience or in the panel have relatives or friends who are psychiatrists or psychologists, I subscribe to the view that they are neither quacks or gods. It wasn't intended as a slur. But is there anyone -- I assume from the answers that you gave in your questionnaires and from the answers you gave to Mr. Wolfson talked to you that most of you tend to fall somewhere in the middle. That is I think everybody pretty much agrees that psychiatry is not an exact science. But from your answers it appears to me that everybody will give careful consideration to the evidence through psychiatrists in dealing with psychiatric issues. Am I mistaken? All right.

One last area. The judge gave you the instruction on circumstantial evidence yesterday. And I can't recall the exact part dealing with the interpretation of circumstantial evidence. But the instruction tells you that both direct and circumstantial evidence are equally valid as a means of proof. There is an important distinction with circumstantial evidence, however. And the instruction will tell you that if circumstantial evidence -- if a particular item of circumstantial evidence is subject to different inferences and one inference points towards innocence or not guilty, the other points towards guilt, and you find that both of those inferences are reasonable, the instruction tells you you have to resolve that doubt in favor of the defendant. In other words, tie goes to Mr. Patterson if you find that both inferences are equally reasonable.

The instruction also says, however, if you find one of the inferences to be reasonable and the other

unreasonable, it's your duty to reject the unreasonable one and adopt the reasonable one. Does everybody understand that? Is there anyone who would have a problem following an instruction such as that? All right.

I don't think I had too much in the way of questions for individual jurors. Ms. DeVoyer, you had indicated in your questionnaire that your hearing wasn't as good as it used to be.

JUROR SEAT NO. 3: Well, that's true.

MR. HUMPHREYS: Have you been able to hear things here in court?

JUROR SEAT NO. 3: Yes, I have.

MR. HUMPHREYS: Okay. When people testify they sit here in the witness stand obviously. Can you hear me okay here?

JUROR SEAT NO. 3: Yes.

MR. HUMPHREYS: We try and tell all of our witnesses to keep their voices up. And if you have a problem, let us know.

MR. HUMPHREYS: Thank you. I believe that's all the questions I had, Your Honor. Pass for cause.

THE COURT: Pass for cause. All right.

Ladies and gentlemen, we now proceed to the next phase of the jury selection which is known as peremptory challenges. And as I explained to you yesterday, the parties do not have to give any reason. I wouldn't try to speculate as to what the reason is. If you're allowed to remain, don't speculate as to why someone else was excused. It should not be held against either attorney or either side when they do exercise peremptory challenges. It's simply a process that has historically been allowed in our law to permit each side to the process of going through peremptory challenges to arrive at the jury that they feel that the legislature California feels will ultimately be a fair and impartial jury in the case. It does not mean by any means that they believe you are unfair or partial in the case.

By law the first peremptory challenge goes to the People. Mr. Wolfson.

MR. WOLFSON: Thank you, Your Honor. I'll thank and excuse Mr. Keith.

THE COURT: Mr. Keith, thank you for coming.

THE COURT: Let me see counsel at this point.

(Discussion off the record)

THE COURT: All right. Then call the next juror in order. We're excusing number 19, Mr. Moore, at this time by stipulation. Is that correct, counsel?

MR. WOLFSON: That's correct, Your Honor.

MR. HUMPHREYS: Yes.

THE COURT: All right. And Mr. Black who is number 20 was excused to the 23rd. So the next juror in order, Madam Clerk, will be.

THE CLERK: Susan Bower.

THE COURT: Ms. Bower, please. Have you heard all the questions that have been asked so far?

JUROR SEAT NO. 7: Yes, I have.

THE COURT: And are there any that you specifically felt you would need to comment upon at this point?

JUROR SEAT NO. 7: Not at this point, Your Honor.

THE COURT: All right. You don't know either of the attorneys?

JUROR SEAT NO. 7: No, I don't.

THE COURT: Don't know the defendant?

JUROR SEAT NO. 7: No, I don't.

THE COURT: Have heard nothing about this case that you can specifically recall at this time or you have?

JUROR SEAT NO. 7: No, I probably read it in the paper at the time it happened.

THE COURT: But you don't recall any specifics at this point?

JUROR SEAT NO. 7: No, I don't.

THE COURT: If you did recall any of them, would you promise to put them out of your mind to the best you can and decide this case if chosen solely on the evidence?

JUROR SEAT NO. 7: Yes, I would.

THE COURT: All right. Mr. Wolfson.

MR. WOLFSON: Thank you, Your Honor. Mrs. Bower, I have gone through your questionnaire. And I note that you apparently do not have a problem with the concept of circumstantial evidence.

JUROR SEAT NO. 7: No, I don't believe I do, no.

MR. WOLFSON: As both His Honor and counsel and myself have mentioned previously, this is not a who done it. The issue that we're concerned with is not how the victim was killed or by whom. But the issue is mental state, planning, deliberation. And, as I indicated earlier, one way to prove that issue is by circumstantial evidence. Another way of course is if the person if the defendant said or made some statements regarding his mental state that also can be used. Do you have any problem using for your deliberations evidence of statements made by a defendant?

JUROR SEAT NO. 7: No, I don't.

MR. WOLFSON: We also talked about concepts of mental illness, legal insanity. Did you hear the instruction that His Honor read regarding legal insanity?

JUROR SEAT NO. 7: Yes, I did.

MR. WOLFSON: Do you believe you can follow that instruction?

JUROR SEAT NO. 7: Yes, I do.

MR. WOLFSON: Do you believe that if you don't feel the defendant was insane per the instruction at the time of the act but believe the defendant was suffering from some form of mental illness, would you follow the instruction regarding insanity and put aside your belief at least to that issue as to?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: In fact, you understand that many people who are charged and convicted of crimes are suffering from some form of mental illness?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: And it's only a defense when it reaches the level of insanity. Do you agree there?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: Did you hear the questions by counsel to the panel as a whole regarding motive?

JUROR SEAT NO. 7: Yes, I did.

MR. WOLFSON: And I think you heard -- I'll have to ask you. Did you hear my talk saying that motive is not an element of the offense, it does not have to prove it.

JUROR SEAT NO. 7: Yes, I heard you say that.

MR. WOLFSON: And counsel talked about a jury instruction correctly that instructs the jury that either motive or absence of motive is something you can take into consideration in your deliberations.

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: Even though it doesn't have to be proven. If it turns out that the motive that apparently existed is a rather irrational, strange or bizarre motive but was in fact the motive for the act, would you take that into consideration in your deliberations? In other words, you understand a motive does not have to make sense?

JUROR SEAT NO. 7: I understand that.

MR. WOLFSON: Would you expect it to make sense; I mean would you only utilize a evidence of a motive if it made sense to you? Do you understand the question?

JUROR SEAT NO. 7: I think I understand the question. But unless you heard what the motive was, you can't answer it.

MR. WOLFSON: Say you did hear a motive. That motive seemed somewhat strange, irrational and bizarre, but it was the reason the motive. Would you say that doesn't make sense; therefore, I'm not going to use it?

JUROR SEAT NO. 7: No, I think I would consider it.

MR. WOLFSON: We asked some questions regarding sympathy either for or against the defendant. I believe you have heard enough by this point to realize we're talking about the death of the defendant's own child.

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: And the first reaction or a reaction might very well and naturally be what kind of person could do that. This is horrible or a monster or something of that nature. And that might generate a -- without hearing any of the facts -- a bias against the defendant. Now I'm asking you to set that aside. Can you do that?

JUROR SEAT NO. 7: Yes, I can.

MR. WOLFSON: And give the defendant a fair trial?

JUROR SEAT NO. 7: Yes, I can.

MR. WOLFSON: On the flip side of that is as we hear the evidence -- and this is I hypothetical also. You might in your mind form the opinion, well, there is other factors. That person is not as horrible as I first thought. And in fact you might start feeling some sympathy -- I say might -- for the defendant. If you do, would you be able to set that aside and judge the case on the law and the facts?

JUROR SEAT NO. 7: Yes, I believe I would.

MR. WOLFSON: I see that in answer to question 26 your husband's son is a Redwood City policeman?

JUROR SEAT NO. 7: Yes, he is.

MR. WOLFSON: Do you see that person on occasion?

JUROR SEAT NO. 7: On occasion.

MR. WOLFSON: And have you ever in the past talked to your stepson about criminals, law?

JUROR SEAT NO. 7: No, we go fishing.

MR. WOLFSON: You go fishing.

JUROR SEAT NO. 7: We go fishing.

MR. WOLFSON: Much better subject.

JUROR SEAT NO. 7: Much better subject.

MR. WOLFSON: But in fact every investigation of any offense is done a certain way. Sometimes the investigation is done better than others. Sometimes as you hear facts about a case you might say, well, my stepson might have done it differently; or if I were doing it, I might have done it differently. I might have handled a

situation differently. If you form an opinion in that way, would you hold that against either the People --

JUROR SEAT NO. 7: No.

MR. WOLFSON: All right, thank you. I'll pass juror for cause.

THE COURT: All right. Mr. Humphreys, any questions?

MR. HUMPHREYS: Good morning, Mrs. Bower.

JUROR SEAT NO. 7: Good morning.

MR. HUMPHREYS: From where you were sitting in the audience, were you able to hear the questions so hearing rather that I covered with the other members of the panel?

JUROR SEAT NO. 7: Yes, I was.

MR. HUMPHREYS: Did any of the subject areas that I talk about raise a concern in your mind concerning your ability to be fair and impartial?

JUROR SEAT NO. 7: No, they didn't.

MR. HUMPHREYS: All right. Is there any reason that you can think of as you sit here today why you could not be a fair and impartial juror to both sides in this case?

JUROR SEAT NO. 7: No.

MR. HUMPHREYS: Thank you, ma'am. Pass for cause.

THE COURT: All right. Then it's now the defendant's first peremptory.

MR. HUMPHREYS: Your Honor, I'm going to thank and excuse Mrs. DeVoyer.

THE COURT: Mrs. DeVoyer, you're excused. Thank you for coming.

JUROR SEAT NO. 3: Thank you.

THE COURT: All right. You may call the next juror.

THE CLERK: George Strock.

THE COURT: All right. Good morning, Mr. Strock.

JUROR SEAT NO. 3: Good morning.

THE COURT: You can hear everything all right?

JUROR SEAT NO. 3: Not really.

THE COURT: Not really.

JUROR SEAT NO. 3: Mr. Wolfson I had a hard time with him. Everybody else I hear.

THE COURT: Okay.

JUROR SEAT NO. 3: Sitting behind him I don't know what he's saying.

THE COURT: Okay. Well, can you hear him -- well, we'll see if you can hear him when you're facing him because that's more important. Hopefully, he won't have to talk with you behind him from here on. So, and obviously I'm in the best position of all because I'm facing everyone. So it you should be able to hear me hopefully. Do you know of any reason as you sit here now why you could not fairly and impartially judge the case?

JUROR SEAT NO. 3: Not really, no.

THE COURT: And if the witnesses spoke in the tone of voice that I'm speaking, would you have any difficulty hearing them?

JUROR SEAT NO. 3: No, I hear you if I pay attention.

THE COURT: All right. Do you have any difficulty in terms of confusing sounds of words that at this point, do you think?

JUROR SEAT NO. 3: Well, if there was other noises, yes, it would bother me.

THE COURT: It would not if there is no other background noise?

JUROR SEAT NO. 3: Background noises it bothers me. Like talking out here in the well in the chairs out there or something like that. That would bother me.

THE COURT: But if everybody were quiet other than the testimony of a witness, you feel you would be able to understand what they were saying?

JUROR SEAT NO. 3: Yeah.

THE COURT: And you would not have any difficulty confusing what might have been said?

JUROR SEAT NO. 3: No problem that way.

THE COURT: All right. Mr. Wolfson. Oh, have you heard anything about this case before you?

JUROR SEAT NO. 3: Other than when it happened and I read it in the local paper.

THE COURT: All right. Do you believe you could set aside whatever you read in the local paper even if it sounds vaguely familiar to what you?

JUROR SEAT NO. 3: I really don't remember all that much about it.

THE COURT: It sounds like you could. All right, Mr. Wolfson, you may proceed.

MR. WOLFSON: Mr. Strock, I do note that you mention you do have some problem with hearing. Are you wearing any hearing aids?

JUROR SEAT NO. 3: No, I'm not.

MR. WOLFSON: Can you hear me now?

JUROR SEAT NO. 3: Yes.

MR. WOLFSON: I think counsel and His Honor and myself would stipulate that what may be reported in the local paper there is a presumption it may not be entirely all the facts. But do you recall what you did -- is there anything about what you read in the local paper that is of concern to you that might make you feel that you could not sit on a jury in this case?

JUROR SEAT NO. 3: No.

MR. WOLFSON: You are retired from the Navy?

JUROR SEAT NO. 3: Yes.

MR. WOLFSON: 21 years?

JUROR SEAT NO. 3: Yes.

MR. WOLFSON: And this would be the second time that you served as a juror?

JUROR SEAT NO. 3: Yes.

MR. WOLFSON: But the first time was over 20 years ago, 1970 or so?

JUROR SEAT NO. 3: 3/3/70 did I put? I should have said '90.

MR. WOLFSON: Okay. So just a few years ago. Was that here in Nevada County?

JUROR SEAT NO. 3: It was downstairs.

MR. WOLFSON: And was there anything about that experience that would concern you negatively about serving as a juror again?

JUROR SEAT NO. 3: No.

MR. WOLFSON: You have heard the discussion from myself and counsel about circumstantial evidence?

JUROR SEAT NO. 3: Mostly.

MR. WOLFSON: Okay.

JUROR SEAT NO. 3: Except when you made any comments.

MR. WOLFSON: Okay. Well.

THE COURT: He heard the instruction that I read, I assume.

JUROR SEAT NO. 3: Yes.

MR. WOLFSON: You did hear the instruction. And, as I said before, the issue of the fact that a child is killed, who killed the child, how the child was killed. I think counsel said this also is not a who done it. That part of the case is not in dispute. And that part of the case in fact will not have to be proven by circumstantial evidence. Did you hear my example which gave the difference between direct and circumstantial evidence?

JUROR SEAT NO. 3: No, I didn't.

THE COURT: Ask him if he thinks he needs one.

MR. WOLFSON: Do you think it would help you since you seem to hesitate on the issue of circumstantial evidence if I gave the example again if the rest of the jurors and potential jurors would bear with us?

JUROR SEAT NO. 3: I don't. I don't believe I would have a problem with circumstantial evidence.

MR. WOLFSON: But you understand what it is?

JUROR SEAT NO. 3: I believe I do.

MR. WOLFSON: It's facts that are presented which an inference can be drawn from to prove other facts. And, in fact, would you not agree that it's not possible to simply open open up a person's and to look into their mind to find out what they're thinking?

JUROR SEAT NO. 3: Okay.

MR. WOLFSON: You agree there?

JUROR SEAT NO. 3: Yes.

MR. WOLFSON: And, in fact, one way to find out of course would be directly, and that would be if the person tells us what they're thinking. I'm thinking so and so. That may or may not be true. A person is in your experience you have seen people do not always tell the truth. You agree there?

JUROR SEAT NO. 3: All right.

MR. WOLFSON: And if a person tells you what he's thinking, it may or may not be true, but it is an indication.

JUROR SEAT NO. 3: All right.

MR. WOLFSON: You'll agree there. But you can also look at the person's actions. And from their actions you can infer what they were thinking when they formed those actions.

JUROR SEAT NO. 3: You could try.

MR. WOLFSON: And that would be circumstantial evidence. Would you discard that evidence or would you utilize it if you think the evidence of what they were doing was valid or truthful evidence?

JUROR SEAT NO. 3: That would be hard to say. I would try to figure this out in my own mind, I believe, and come up with a solution of my own on what I hear and what I see.

MR. WOLFSON: None of us were there when the child was killed, so we have to rely on witnesses. Do you think you can rely on witnesses?

JUROR SEAT NO. 3: Yes.

MR. WOLFSON: And you'll listen to those witnesses?

JUROR SEAT NO. 3: I would listen.

MR. WOLFSON: And in listening to those witnesses, do you think you'll be able to judge the testimony of those witnesses?

JUROR SEAT NO. 3: Yes.

MR. WOLFSON: To the testimony, veracity, truthfulness and take, you listen to see what position they

were in how they were able to observe what they observed?

JUROR SEAT NO. 3: Right.

MR. WOLFSON: Do you believe that a person who intentionally kills his own child is necessarily mentally ill or we use the term crazy also?

THE COURT: You mean in every case is what I think the question.

MR. WOLFSON: In every case.

THE COURT: Absolutely.

MR. WOLFSON: Necessarily I think we asked.

THE COURT: What he's saying is do you find that that act alone would absolutely prove in your mind that the person was mentally ill as opposed to perhaps disturbed for some other reason?

JUROR SEAT NO. 3: Right now I would say the person would have to be unstable. Without any evidence of any kind, I would say so, yeah.

MR. WOLFSON: You heard the definition of insanity?

JUROR SEAT NO. 3: Insanity.

MR. WOLFSON: That His Honor read?

JUROR SEAT NO. 3: Yes.

MR. WOLFSON: And that definition is not defined as simply mentally disturbed, suffering from a mental disease or defect. It goes further than that. It requires a person not being able to understand the nature and quality of his act which is simply legalese for he didn't know what he was doing or what the effect of what he was doing was. And.

JUROR SEAT NO. 3: Go ahead.

MR. WOLFSON: And could not tell the difference between right and wrong. Now in your deliberations, if you're asked to determine whether or not someone is insane, would you recognize there is a difference between mental illness and the legal definition of insanity?

JUROR SEAT NO. 3: I have a problem with temporary insanity and rage. I can't separate them.

MR. WOLFSON: Would you explain what you mean?

JUROR SEAT NO. 3: A person can have -- well, I don't know what I say -- a blank and do something. And it would be really insane or a rage and lose all of his fact simply reasoning and do something. Whether and then be sorry he did it. Or it's a rage that could do something and without thinking about it and really in a rage do something in a rage just goes out of his mind. Let's put it that way. It has no control over yourself.

MR. WOLFSON: If you heard a definition of legal insanity that did not include just a rage, would you still have a problem separating the two?

JUROR SEAT NO. 3: I don't think so.

THE COURT: Let me ask you a question, sir. There is a difference between acting from a sense of judgment, your own rational judgment, and acting from passion. You understand the difference there?

JUROR SEAT NO. 3: Yes.

THE COURT: Okay. Do you accept the possibility that a person could in a fit of rage act out of passion rather than from judgment? Did you hear that?

JUROR SEAT NO. 3: I heard that.

THE COURT: In other words, two people get in a fight in a bar, and one of them is getting the worse end of the deal and is getting extremely bloody and injured. And pulls out a knife and just stabs the other person. That might not be a crime committed while thinking clearly with all of your faculties. Yet you wouldn't say that that person was necessarily temporary insane either.

JUROR SEAT NO. 3: That would to me if explained like that would be rage.

THE COURT: Okay. But it wouldn't necessarily be insane.

JUROR SEAT NO. 3: Wouldn't be insanity, no.

THE COURT: So what I'm saying, what we're trying to get at here is some people act out of rage and are insane. Some people act out of passion or rage and are

not insane. You can't automatically assume either way. And that's what we're trying to find out. Is do you automatically assume that because someone is in a rage or acting out of passion that they're necessarily insane even though 20 minutes later they might as we say colloquially come to their senses and realize they did something far worse than they expected?

JUROR SEAT NO. 3: Well, I think I could with somebody explaining it to me, you know, through the court here I could separate rate them.

THE COURT: All right. You may proceed.

MR. WOLFSON: I have no further questions. Thank you very much.

THE COURT: Mr. Humphreys.

MR HUMPHREYS: Thank you. Your last name is pronounced Strauch?

JUROR SEAT NO. 3: Strach.

MR. HUMPHREYS: Can you hear me okay?

JUROR SEAT NO. 3: What's that?

MR. HUMPHREYS: We usually get that during at least once during every trial, I think. Can you hear me okay now?

JUROR SEAT NO. 3: Yes.

MR. HUMPHREYS: When I was up here earlier, were you able to hear me?

JUROR SEAT NO. 3: I was.

MR. HUMPHREYS: From where you were sitting?

JUROR SEAT NO. 3: I was, yes.

MR. HUMPHREYS: Because I didn't want to repeat all of that stuff again.

JUROR SEAT NO. 3: All right.

MR. HUMPHREYS: And I'm sure nobody else wanted me to repeat it either. Did any of the subject areas that I talked about raise any concerns in your mind?

JUROR SEAT NO. 3: No.

MR. HUMPHREYS: You understand that if you're called upon to sit as a juror in this case, when we talk about or when we get to the point of the trial if we do where we're talking about sanity issues, the judge will give

you instructions. He'll give you some guidelines if you will. But you'll still have to decide what the facts are and how the instructions may or may not apply to the facts that you find. Do you think you'll be able to do that?

JUROR SEAT NO. 3: I do.

MR. HUMPHREYS: All right. You had indicated on one of your questions dealing with I think it was the question 74, counsel, dealing with the standard of proof in a criminal case. You indicated from your answer to that question I believe that you thought that the standard of proof should be higher in a murder case. You recall that answer offhand?

JUROR SEAT NO. 3: No.

MR. HUMPHREYS: Okay. Assuming that's your answer know.

JUROR SEAT NO. 3: I remember it, but I don't remember the wording of it.

MR. HUMPHREYS: Okay. Somebody yesterday I think answered the same way. When they were asked to explain it, they said something along the lines, well, I realize the standard of proof is the same in every case, but there is a big difference between a murder case and like a trespass case or a shoplifting case. And I suppose one other difference is that the amount of evidence that you hear in a murder case is going to be a heck of a lot more than you're going to hear in your average trespassing case. I don't know if you assume that the burden of proof is the same in every criminal case in the State of California which it is proof beyond a reasonable doubt, is there any reason that you would hold Mr. Wolfson to a higher standard just because the charge is murder?

JUROR SEAT NO. 3: No.

MR. HUMPHREYS: Would you, on the other hand, want to carefully consider all of the evidence that's been presented to you?

JUROR SEAT NO. 3: Yes, I would.

MR. HUMPHREYS: That is correct, Mr. Strock. That's all I have. Pass for cause, Your Honor.

THE COURT: All right. Mr. Wolfson, it's the People's peremptory.

MR. WOLFSON: Thank you, Your Honor. I'll thank and excuse Mr. Bramlick.

THE COURT: Mr. Bramlick, thank you for coming.

THE COURT: Call the next prospective juror.

THE CLERK: Robert Hussock.

THE COURT: All right. Mr. Hussock, you have heard the questions that have been asked by counsel and the court?

JUROR SEAT NO. 4: Yes, sir.

THE COURT: Are there any specific ones that from what you have heard so far you think we ought to hear about at this point?

JUROR SEAT NO. 4: No.

THE COURT: All right. You have heard -- have you read about the case before?

JUROR SEAT NO. 4: No, sir.

THE COURT: Do you know any of the attorneys or the defendant?

JUROR SEAT NO. 4: I do not.

THE COURT: And I assume from the questionnaires that you don't know any of the witnesses; or if you did, they're going to ask you about them. So I won't go into that now.

Do you know of any reason as you sit here why you couldn't act fairly and impartially during the course of this trial?

JUROR SEAT NO. 4: No, sir.

THE COURT: All right. Mr. Wolfson.

MR. WOLFSON: Thank you, Your Honor. Mr. Hussock, have you heard me all right?

JUROR SEAT NO. 4: Yes, sir.

MR. WOLFSON: I note you did mention that high frequency sounds --

JUROR SEAT NO. 4: That's correct.

MR. WOLFSON: -- can create a problem. Well, my voice is not high. It's probably low which creates the

problem normally. I see that on your questionnaire you're a geologist.

JUROR SEAT NO. 4: Yes, sir.

MR. WOLFSON: That's a form of an engineer?

JUROR SEAT NO. 4: It's a separate type of science.

MR. WOLFSON: You analyze.

JUROR SEAT NO. 4: Correct.

MR. WOLFSON: And involved in planning.

JUROR SEAT NO. 4: To a degree, yes.

MR. WOLFSON: Apparently you also have a degree in psychology, geology and resources engineering.

JUROR SEAT NO. 4: No, sir. That's my spouse.

MR. WOLFSON: Oh, I'm sorry.

THE COURT: He analyzes rocks.

MR. WOLFSON: He analyzes rocks, not people. You're not going to carry over your analysis of rocks to -- I'm just being facetious. I bring that up because sometimes folks who are engineers or who work in fields that are close to engineering start analyzing how the attorneys present their case, start analyzing how the investigation was done. And start picking it apart which in effect leaves an effect that holds the attorneys, the law enforcement agencies and perhaps even the psychiatrists who are called by either the defense or the prosecution to a higher standard than might be reasonable. Do you think that you, first of all -- and I'm going to go back to this too, it's how we finished up with the last potential juror. Do you think you would hold the People to a standard higher than proof beyond a reasonable doubt?

JUROR SEAT NO. 4: No, sir.

MR. WOLFSON: I notice question 74, you may not remember, but you underlined the question, asks the standard of proof in any criminal case is proof beyond a reasonable doubt is the same for a murder case which is what counsel was asking in the last potential juror. Do you also realize we're talking about the same standard of proof? This is not an a capital case, but.

JUROR SEAT NO. 4: Correct.

MR. WOLFSON: It's still the murder case the same standard of prove as a shoplift or a trespass.

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: And a concern of the People we're asking simply for a deliberation that's fair and a verdict based on the evidence and the law as instructed by His Honor. But at the same time some folks feel that proof beyond a reasonable doubt is proof beyond all possible doubt. And in fact the instruction talks about that. That's impossible standard.

JUROR SEAT NO. 4: Correct.

MR. WOLFSON: So we're talking about reason and reasonable doubt.

JUROR SEAT NO. 4: Yes, sir.

MR. WOLFSON: Going back to question 57. Do you have any feeling that a person who kills his own child must necessarily be mentally ill or crazy. You answered no. And of course we didn't give you any details. Rightfully I think at least one potential juror brought up I don't know what you were specifically referring to. I don't know the facts of this case. Here as probably ascertained we're talking about a person who did not kill in self-defense, who did not kill as a result of an accident, but a killing by a parent of his own child. Do you automatically do you have the same or would you have knowing what I just told you the same answer?

JUROR SEAT NO. 4: I would.

MR. WOLFSON: And you don't have a problem between differentiating between a mental illness and mental defect, mental disease, psychotic disorder, whatever the evidence shows, and the legal definition. You feel you can follow the legal definition of insanity?

JUROR SEAT NO. 4: Yes, sir.

MR. WOLFSON: And you do agree that many people who commit crime and ultimately are found guilty are suffering from some form of mental illness?

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: Again, there is a difference between mental illness and the legal definition of insanity.

JUROR SEAT NO. 4: Yes, sir.

MR. WOLFSON: As you heard from His Honor, we're going to be if there is a second phase to the trial concerned with the legal definition of insanity.

JUROR SEAT NO. 4: Okay.

MR. WOLFSON: And as counsel pointed out, the burden then shifts -- the burden of proof shifts to the defense.

JUROR SEAT NO. 4: Correct.

MR. WOLFSON: But the burden is lesser. It's not beyond a reasonable doubt; it's by a preponderance of the evidence. Do you think you could make that -- be able to make that mental shift also?

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: Also, I think we have talked enough about the fact that mental illness is something that's not absolute, it's in varying degrees. Do you agree?

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: And you agree there. And somebody who is maybe mentally ill to the point they might be catatonic or in some other state or where they can't think at all, their thinking is not in some way demonstrated. But there is people who are mentally ill but still can function and do function, do plan, do plot, carry out their lives in different ways.

JUROR SEAT NO. 4: I agree.

MR. WOLFSON: I have nothing further. Thank you very much.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Thank you, Your Honor. Mr. Hussock, how are you this morning?

JUROR SEAT NO. 4: Fine, thank you.

MR. HUMPHREYS: That's good. Were you able to hear the subject areas I talked about with the other members of the panel this morning?

JUROR SEAT NO. 4: Yes, sir, I could.

MR. HUMPHREYS: And did any of the subject areas that I raised or talked about raise any concerns in your mind?

JUROR SEAT NO. 4: No, sir.

MR. HUMPHREYS: In this particular case obviously you know that we're dealing with a situation involving death of a child.

JUROR SEAT NO. 4: Correct.

MR. HUMPHREYS: At the hands of the father. We're not talking about self-defense. We're not talking about an accident. Things that other jurors voiced as being things that would not necessarily raise a mental health issue. Knowing that we're dealing with a nonexcusable type of killing and just starting out from that point, is there any reason that you would not be able to listen to all the evidence fairly with an open mind?

JUROR SEAT NO. 4: No.

MR. HUMPHREYS: You agree that the death of any human being at the hands of another is a serious matter?

JUROR SEAT NO. 4: I do.

MR. HUMPHREYS: Can you appreciate also, however, that the law provides for varying degrees of culpability depending on the facts of each particular case and what findings the jury makes?

JUROR SEAT NO. 4: I can.

MR. HUMPHREYS: You don't have any problem with that sort of approach that the law takes?

JUROR SEAT NO. 4: No, sir.

MR. HUMPHREYS: I mean there are some people that take the view insanity is just a cop out, okay. Insanity is just something that somebody uses to avoid responsibility. I think one of the more notorious cases in the past ten years was John Hinkley who took a couple of shots at President Reagan back in March of '81 I think whenever. He entered a plea of not guilty by reason of insanity. And apparently was found not guilty by reason of insanity. And a lot of people were upset with it. Do you have any negative feelings about a plea or the concept of not guilty by reason of insanity?

JUROR SEAT NO. 4: No, sir.

MR. HUMPHREYS: I think that's all the questions I have for you, sir. Thank you.

THE COURT: All right. Pass for cause?

MR. HUMPHREYS: Pass for cause. Sorry, Your Honor.

THE COURT: Now your peremptory.

MR. HUMPHREYS: We would thank and excuse Juror No. 8, Mr. Bildoe.

THE COURT: Mr. Bildoe, you're excused. Thank you for coming.

THE COURT: Call the next juror.

THE CLERK: Donald Chaney.

THE COURT: Good morning, Mr. Chaney.

JUROR SEAT NO. 8: Good morning.

THE COURT: You have heard all the questions that have been asked so far?

JUROR SEAT NO. 8: Yes, I have.

THE COURT: And are there any specific things you think we ought to know about concerning your qualifications to serve at this point?

JUROR SEAT NO. 8: None comes to mind.

THE COURT: All right. Have you heard anything about the case before today that you can recall?

JUROR SEAT NO. 8: Vaguely. I think I heard something on the news. But the information was of such that I couldn't make any conclusions.

THE COURT: So is it something that's -- do you think that whatever you did hear would have any bearing on your deliberations as a juror and your ability to listen to the facts in this case?

JUROR SEAT NO. 8: Absolutely not.

THE COURT: All right. Mr. Wolfson.

MR. WOLFSON: Thank you, Your Honor.

How are you today, Mr. Chaney?

JUROR SEAT NO. 8: Just fine.

MR. WOLFSON: Have you been able to hear the three of us speak?

JUROR SEAT NO. 8: Yes, very well.

MR. WOLFSON: Any problems hearing?

JUROR SEAT NO. 8: No problems.

MR. WOLFSON: From your questionnaire you're self-employed as a building contractor. Is there is there a concern that you have if the trial does go a little longer than we estimate that employees might suffer and that they don't have you there to supervise?

JUROR SEAT NO. 8: No, not at this time.

MR. WOLFSON: You indicated that your minor was psychology?

JUROR SEAT NO. 8: I have a psychology minor, yes.

MR. WOLFSON: Is there any concern that you have that you may not be able to differentiate between mental illness and the legal definition of insanity?

JUROR SEAT NO. 8: No.

MR. WOLFSON: I do note that in answer to question 57 you answered yes. And then you mentioned that you didn't, you know, not knowing specifics, you didn't know really what there was to be said other than there probably be a problem. Of course, when you answered this you didn't know as much as you know now which would be is less than you'll know after the trial begins if you're chosen as a juror. Knowing we're talking about as counsel indicated not an accident, not self-defense, something not justifiable killing, do you have the same answer or yes again or?

JUROR SEAT NO. 8: I still have the same answer. There has to be more information before I can make be able to sift this thing out.

MR. WOLFSON: If you found that you felt a bias against the defendant or have a bias against the defendant for because of the nature of the crime, do you think you can set that aside?

JUROR SEAT NO. 8: I have no bias and I can set it aside if I did, yes.

MR. WOLFSON: If you find that you have you develop a bias or even sympathy for the defendant, do you believe you can set that aside?

JUROR SEAT NO. 8: Yes.

MR. WOLFSON: I have nothing further. Thank you.

THE COURT: All right. Mr. Humphreys.

MR. HUMPHREYS: Thank you, Your Honor. Good morning, Mr. Chaney.

JUROR SEAT NO. 8: Good morning.

MR. HUMPHREYS: Were you able to hear the subject areas I talked about earlier this morning with other members of the panel?

JUROR SEAT NO. 8: Yes.

MR. HUMPHREYS: Would your answers be -- well, did any of the areas I talk about raise red flags or concerns in your mind?

JUROR SEAT NO. 8: No.

MR. HUMPHREYS: One advantage we have when people fill out questionnaires, like I said earlier, we get a lot of information about their backgrounds and so forth. We also discover how we could have worded questions better. And I think I know where you're coming from on this one. But we asked a question there may be some graphic photographs of the crime scene and/or autopsy presented in this case. Is there anyone who would have difficulty viewing and considering such evidence. You checked the box that said yes. Now, obviously, that question could have been, should have been worded would you have difficulty.

JUROR SEAT NO. 8: I would not have difficulty.

MR. HUMPHREYS: But you don't know about everybody else.

JUROR SEAT NO. 8: That's right.

MR. HUMPHREYS: Okay. You have never served on a jury before, have you?

JUROR SEAT NO. 8: No.

MR. HUMPHREYS: You're still in the Air Force correct?

JUROR SEAT NO. 8: I'm retired.

MR. HUMPHREYS: Oh, retired. Okay. When you were in the Air Force, did you ever on occasion have to view dead bodies?

JUROR SEAT NO. 8: On occasion.

MR. HUMPHREYS: It's a rather unsettling experience, isn't it?

JUROR SEAT NO. 8: You don't get used to it, no.

MR. HUMPHREYS: I think everybody would say that it's something you never get used to. And in any murder case there is that potential. Any case where the charge is murder or indeed any case where a death has occurred. It may be necessary to view the body of a deceased person. And keeping in mind that it's something you never get used to, could you nonetheless keep an open mind even if you had to view photographs or other representations that might be distasteful?

JUROR SEAT NO. 8: Yes.

MR. HUMPHREYS: All right. Thank you, Mr. Chaney. Pass for cause, Your Honor.

THE COURT: All right. The next peremptory challenge lies with the People.

MR. WOLFSON: I'll thank and excuse Mr. Strock.

THE COURT: All right, Mr. Strock, thank you. You're excused.

Madam Clerk, call the next person, please.

THE CLERK: Michael Connor.

THE COURT: All right. Mr. Connor, you can see where your seat is going to be. We're going to take a morning recess briefly to give everyone a chance to stretch your legs. You'll take that seat when we return. We'll take a 10-minute recess. We'll see you back here at five after eleven.

(Brief recess taken)

THE COURT: Court will be in session in People versus Patterson, number 49140. The defendant is present with counsel. All the jurors are present. You may proceed, Mr. Wolfson.

MR. WOLFSON: Your Honor, may we approach the bench?

THE COURT: All right.

(Discussion off the record)

THE COURT: All right. We're going to -- the parties have asked based on some of the answers in your questionnaire, Mr. Connors, that we do the voir dire of you in chambers in the court's chambers in private. So we're going to have to have the reporter, the clerk, the defendant, Mr. Connor, the bailiffs and counsel, and we'll do that right now. The rest of you we'll ask just to sit tight for a minute.

(In chambers)

THE COURT: All right. We're in session in People versus Patterson. The defendant is present. We're in chambers. Present are the defendant his counsel the district attorney, court personnel and Mr. Connor who is the next juror in line to be questioned.

Mr. Wolfson, why don't you go ahead. And I don't have the questionnaire in front of me, so why don't you ask.

MR. WOLFSON: We don't mean to pick on you, Mr. Connors, but there is two concerns that were raised that both counsel and myself saw. And actually one of them is apparently you are the victim of a concealment of a child case?

JUROR: Yes, sir. Going on right now.

THE COURT: In fact, they have been before me in court.

JUROR: Yes, sir.

MR. WOLFSON: Is that something that's been reported to the district attorney's office or that --

JUROR: Yes, sir.

MR. WOLFSON: And our office is investigating?

JUROR: Your special prosecution division. I still have to meet with the investigator.

MR. WOLFSON: Okay. But they are involved in it?

JUROR: The report was filed from Grass Valley to your office.

MR. WOLFSON: Without going further, I'd stipulate that he could be excused if the concern would be he's got a case in our office presently.

THE COURT: Sure, sure, I understand. In fact, it involves a crime against -- alleged crime against a child.

MR. WOLFSON: That too.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Yeah. Main concern I had is it seemed like you have a lot of stressors in your life right now. And this trial could be another one or your participation?

JUROR: I was looking forward to it, but I understand. Yeah.

THE COURT: All right. Then counsel stipulating he may be excused?

MR. HUMPHREYS: Yes, Your Honor.

THE COURT: All right, sir. You can go out this way if you want.

(Open court)

THE COURT: All right. Madam Clerk, you may call the next name.

THE CLERK: S. Kay Mathis.

THE COURT: All right. Good morning.

JUROR SEAT NO. 3: Good morning.

THE COURT: I think you have heard all the questions that have been asked so far.

JUROR SEAT NO. 3: I have.

THE COURT: You have at least a vague idea of what this is all about. From what you have heard so far, is there anything you thought that we should know about at this point, or do you know of any reason right now that you could not be fair and impartial in judging the facts in this case?

JUROR SEAT NO. 3: None at this time.

THE COURT: All right. Have you heard about the case before that you can remember?

JUROR SEAT NO. 3: Only slightly. A little bit in the newspaper several months ago.

THE COURT: All right. You understand that as the defendant sits here today, he's presumed to be innocent until the People prove the contrary beyond a reasonable doubt?

JUROR SEAT NO. 3: Absolutely.

THE COURT: And are you in agreement with that standard, and would you hold the People to that standard.

JUROR SEAT NO. 3: Yes.

THE COURT: And, likewise, if we get to a sanity phase, it's his burden to prove he was insane by a preponderance of the evidence, a lesser standard. Do you feel that you could apply that standard if we get to that stage of the case?

JUROR SEAT NO. 3: Yes, I do.

THE COURT: All right. Mr. Wolfson, you may proceed.

MR. WOLFSON: Thank you, Your Honor. I see you on a question seven you picked up our clumsy language that was regarding photographs.

JUROR SEAT NO. 3: I don't remember the question.

MR. WOLFSON: There may be some graphic photographs of the crime scene and/or autopsies or anyone who would have difficulty viewing and considering such evidence. You said yes, but I think that you really meant other people. You yourself feel that you could.

JUROR SEAT NO. 3: Oh, I could handle it.

MR. WOLFSON: Sure.

MR. WOLFSON: You work for the Placer County Office of Education.

JUROR SEAT NO. 3: Yes, I do.

MR. WOLFSON: And you work as secretary to somebody apparently who is in charge of a program that deals with drug, alcohol or tobacco use prevention?

JUROR SEAT NO. 3: Yes.

MR. WOLFSON: You heard our concerns about such matters as circumstantial evidence?

JUROR SEAT NO. 3: Yes, I did.

MR. WOLFSON: And do you have any reluctance to if you believe it's valid evidence view circumstantial evidence?

JUROR SEAT NO. 3: No problem with that at all.

MR. WOLFSON: And, in fact, if you have any, you would still decide whether the evidence you are hearing received that you believe is valid, just whether it be circumstantial or direct evidence?

JUROR SEAT NO. 3: Yes.

MR. WOLFSON: I do note that you noted that you're acquainted with me. Is there anything about that acquaintanceship that might create a problem or conflict?

JUROR SEAT NO. 3: No.

MR. WOLFSON: And as to the issue of mental health, mental defect, disease, psychoses are as it relates to the definition of legal insanity, do you have any kind of a problem or concern in that differentiation?

JUROR SEAT NO. 3: No, sir.

MR. WOLFSON: You agree a person can be suffering from some form of mental illness, even a severe form of mental illness, and still not be legally insane if you felt there was evidence to indicate they as His Honor instructed understood the nature and quality of their act and could differentiate between right and wrong?

JUROR SEAT NO. 3: Yes.

MR. WOLFSON: Do you have any disagreement with that concept?

JUROR SEAT NO. 3: No, I don't.

MR. WOLFSON: And do you agree that a person could be mentally ill hypothetically and still be able to scheme, plot, plan?

JUROR SEAT NO. 3: Yes.

MR. WOLFSON: Carry out?

JUROR SEAT NO. 3: Uh-huh.

MR. WOLFSON: Their intentions?

JUROR SEAT NO. 3: Yes.

MR. WOLFSON: Form intent?

JUROR SEAT NO. 3: Uh-huh.

MR. WOLFSON: Mr. Humphreys when speaking with the last juror mentioned folks idea about folks who use the insanity defense. And he mentioned the Hinkley case. Do you have any problem with -- did you hear him?

JUROR SEAT NO. 3: Yes, I heard it.

MR. WOLFSON: Did you hear why he was -- you understood what he meant by the question?

JUROR SEAT NO. 3: Yes.

MR. WOLFSON: And we also would ask that you be fair and impartial to both sides and not simply go into a trial with a preconceived notion regarding the insanity defense. But there are some differences between California law and federal law on the issue of insanity. So there is a presumption in California during the guilt phase that a person is sane. During the sanity phase in California, the burden shifts to the defendant to prove the defendant is insane by a preponderance of the evidence. Do you have any kind of a problem with those concepts?

JUROR SEAT NO. 3: No problem.

MR. WOLFSON: All right, thank you. I have nothing further.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Thank you, Your Honor. Ms. Mathis, from where you were sitting this morning, were you able to hear the subject matters I went over with the other jurors?

JUROR SEAT NO. 3: Yes, sir, I was.

MR. HUMPHREYS: Did any of those areas raise red flags or warning bells in your head?

JUROR SEAT NO. 3: No, sir.

MR. HUMPHREYS: Okay. What do you think about psychiatrists and their ability to function accurately in general?

JUROR SEAT NO. 3: Well, I think they're pretty much human, they just have a lot more insight or facts to deal with workings of how people handle things.

MR. HUMPHREYS: In any court case, not just a criminal case, but a court, any sort of court case, we sometimes have situations where we have what are called expert witnesses. In this case I anticipate that the bulk of the expert witnesses are going to be medical doctors who are specializing in the practice of psychiatry. And I can't tell you what their opinions are at this time. But you may find that their opinions differ in some degrees. You may

find that they're similar. But it will be your job as a juror, assuming we have a case where the psychiatrists or 180 degrees opposite from each other, you'll have to try and sort out who is more credible, which opinions seem to be based on the facts. We'll ask you to try and resolve the differences if there are any and reach a verdict. Do you think you can do that?

JUROR SEAT NO. 3: Yes, sir, I do.

MR. HUMPHREYS: All right. Have you ever had any experience dealing with dead bodies?

JUROR SEAT NO. 3: No.

MR. HUMPHREYS: As Mr. Wolfson said, you were one of the people that noted the typographical error in that one question. Now we proofread as best we can, but we find out after 52 people have looked at the same question where we might have slipped up and missed something.

JUROR SEAT NO. 3: I understand that.

MR. HUMPHREYS: But, in any event, do you think you'll have any problem dealing with what may be somewhat graphic photographs of a dead body?

JUROR SEAT NO. 3: I don't think so.

MR. HUMPHREYS: Okay. Your job as a juror will be to treat that as a piece of evidence and not let your reason and impartiality be overcome by passion or revulsion whatever. Do you think you can do that?

JUROR SEAT NO. 3: Yes, sir.

MR. HUMPHREYS: Thank you. I have no further questions. And I pass Ms. Mathis for cause, Your Honor.

THE COURT: All right. Thank you. By the way, this problem with the question, it brings up the very fact of why we have 12 jurors. The experience was here we have had two attorneys and I myself have briefly looked at these questionnaires, and all three of us missed it. One of the reasons we have 12 people to try a criminal case is because we figure 12 minds are enough people if someone is going to miss something it's going to be found out through the process of having that many people. So this is an example of how the wisdom of having a jury of more

than two or three people. I believe it's the defendant's peremptory.

MR. HUMPHREYS: Yes, Your Honor. We would thank and excuse juror number nine, Mr. Wagner.

THE COURT: Mr. Wagner, you're excused. Thank you for coming.

THE CLERK: Gerrard Aylers.

THE COURT: Good morning.

JUROR SEAT NO. 9: Good morning.

THE COURT: I notice that you have a slight accent.

JUROR SEAT NO. 9: Yes.

THE COURT: It's not something you obviously can -- well, let me put it this way. Each of the attorneys in talking to the prospective jurors asked them questions about hearing and understanding. I assume that you have been able to hear and understand everything clearly that has been stated; is that correct?

JUROR SEAT NO. 9: That's correct.

THE COURT: All right, very well. And I haven't read your questionnaire, so I know nothing about your background or anything of that kind. Do you know of any reason in your background, anything as you sit here today why you couldn't be fair and impartial in this case to either side of the trial?

JUROR SEAT NO. 9: No.

THE COURT: And have you any connection with the prosecution or the defense attorney as far as you know?

JUROR SEAT NO. 9: No.

THE COURT: All right. And have you ever heard of this case before?

JUROR SEAT NO. 9: I heard it on channel three whenever it was. I forgot what time that was.

THE COURT: Several months ago then?

JUROR SEAT NO. 9: Yeah.

THE COURT: Do you remember any of the specifics to the point where you think they would stick in your mind more than what you might hear from the witnesses?

JUROR SEAT NO. 9: No. I just remember that I discussed with my wife and I boy that poor guy must have been under big stress.

THE COURT: Okay. And several other jurors have indicated that this type of thing doesn't normally happen to people who are not under any type of stress. I mean all of us in our what we call our normal state of being don't go out and do something like what you saw portrayed on t.v. I think you would agree with that.

JUROR SEAT NO. 9: That's correct.

THE COURT: The issue here before us, however, isn't how people -- well, the precise issue before you is really if you're chosen as a juror is going to be to decide whether the stresses were the product of an insane person in the legal sense of that term or were the product of somebody who as you said was stressed but still capable under the law of functioning to the degree that he could premeditate and deliberate. That means to plan and consider options and form the various mental states that our law requires for the crime of murder. Do you feel that you could as you sit here today look at that kind of evidence dispassionately, that is without any preconceived notion at this point as to whether the defendant is insane or not?

JUROR SEAT NO. 9: I could.

THE COURT: And that you would make your judgment of sanity or insanity or of ability to form these various mental states solely from the evidence which is the witnesses, the doctors that testify, the exhibits and so forth that you could do that?

JUROR SEAT NO. 9: Yes.

THE COURT: All right. Mr. Wolfson, any questions?

MR. WOLFSON: Thank you, Your Honor.

Mr. Aylers, you did not answer a couple of the questions that deal with circumstantial evidence. Do you agree circumstantial evidence may be the only way to ascertain a person's intent or mental state?

JUROR SEAT NO. 9: How did I answer that?

MR. WOLFSON: Question mark.

JUROR SEAT NO. 9: I said it's still a question mark.

MR. WOLFSON: Would you reject circumstantial evidence as proving specific intent or mental state? Question.

JUROR SEAT NO. 9: No. I knew that. I would answer that no.

MR. WOLFSON: You would not reject it?

JUROR SEAT NO. 9: That's right.

THE COURT: You did hear the instruction on circumstantial evidence that I read to the jury?

JUROR SEAT NO. 9: Yes, I heard it.

THE COURT: And did you understand it?

JUROR SEAT NO. 9: I understood it.

THE COURT: All right.

MR. WOLFSON: Did you also hear the example I gave of circumstantial evidence?

JUROR SEAT NO. 9: Yes, uh-huh.

MR. WOLFSON: And did it make -- did get any clearer to you what we're talking about?

JUROR SEAT NO. 9: Yes, definitely.

MR. WOLFSON: Number 58, insanity is referred to in this case as a legal term and not a medical term. Do you agree a person can be mentally ill and under the law not insane? And you marked no.

JUROR SEAT NO. 9: That's correct.

MR. WOLFSON: Could you explain a little further what your concern is there?

JUROR SEAT NO. 9: You can either be sane or insane. So that's.

MR. WOLFSON: Okay. We talked about different types of mental illness, mental defect, disease. And there is a difference that mental illness, the various person being psychotic, the nature of the psychoses. Those are medical terms. As defined by His Honor when he read the jury instruction, legal insanity means a person because of a mental disease or defect cannot understand the nature and quality of his act, which is kind of a legalese way of

saying he doesn't know what is being done or is doing and doesn't understand the consequences of it or differentiate between right and wrong. They are under the law two different concepts. When you say you agree a person can be mentally ill and under the law not insane, do you feel that a person who is mentally ill or psychotic automatically under the law --

JUROR SEAT NO. 9: No.

MR. WOLFSON: -- be insane? So you do agree that a person can be?

JUROR SEAT NO. 9: Yeah, he's either mentally ill or he's insane.

MR. WOLFSON: Or both.

JUROR SEAT NO. 9: Yeah, uh-huh.

MR. WOLFSON: And you said you had a problem with that aspect of the law.

JUROR SEAT NO. 9: Well, I think my opinion it's depending on what the defense has to bring up. I would have a problem with that how they were presented to me.

MR. WOLFSON: In other words, you would listen to the witnesses and the evidence?

JUROR SEAT NO. 9: Oh, yes, definitely.

MR. WOLFSON: And you would factor in what you heard as a way of evidence in the case, and you listen to see if the expert witnesses are talking about basing their opinion on the same evidence that you thought was believable or credible.

JUROR SEAT NO. 9: That's right.

MR. WOLFSON: And you would listen to the reasons underlying the expert opinion.

JUROR SEAT NO. 9: Uh-huh, I would.

MR. WOLFSON: And then would you form your own opinion and not let the expert?

JUROR SEAT NO. 9: That's right.

MR. WOLFSON: Now what happened it's very possible I could say hypothetically that the experts will not agree. Do you think that you would just be able to resolve a conflict?

JUROR SEAT NO. 9: I think I could.

MR. WOLFSON: Or would you just say, well, they don't agree; then, therefore, I'm going to hold that against either the People or the defendant depending on the circumstances.

JUROR SEAT NO. 9: Either way.

MR. WOLFSON: All right. Thank you very much. Pass for cause.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Thank you. Mr. Ayers, how are you this morning?

JUROR SEAT NO. 9: I'm doing fine. Thank you.

MR. HUMPHREYS: Did you hear the areas that I went over with some of the other members of the panel earlier this morning?

JUROR SEAT NO. 9: Yes.

MR. HUMPHREYS: Did you hear the particular part on circumstantial evidence that I addressed to the jurors earlier?

JUROR SEAT NO. 9: Yeah, I heard that.

MR. HUMPHREYS: Okay. Knowing that when it comes to the interpretation of circumstantial evidence if you have two reasonable interpretations that point in opposite directions you have to give the defendant the benefit of the doubt and adopt the inference that points towards not guilty. Did hearing that ease some of the concerns you had had about circumstantial evidence?

JUROR SEAT NO. 9: Yes, it did.

MR. HUMPHREYS: I think there is just one other subject area. And this may be just a misunderstanding on your part. The question was would you be willing to apply the beyond a reasonable doubt standard to this case even if you personally think the standard should be higher. You checked no on that one. And I wasn't sure if that was because you thought the standard should be higher or you didn't think the standard should be higher.

JUROR SEAT NO. 9: Could you maybe simplify that statement for me?

MR. HUMPHREYS: Okay. Actually it was tied in with question 74. Question 74 said the standard of proof

in a criminal case is beyond a reasonable doubt. It is the same for murder case as it is for a simple trespass or any other charged crime. Occasionally some jurors believe the standard in a murder case should be higher because the consequences of a conviction may be serious. As we have said, however, the standard is no higher than in any other criminal case. Do you think it should be?

JUROR SEAT NO. 9: No, I think.

MR. HUMPHREYS: And you checked no there which is the appropriate answer. And then kind of the follow-up question is would you be willing to apply the beyond a reasonable doubt standard in this case even though you personally think the standard should be higher. And you checked no on that one. The way it was worded had the potential for some confusion. But do you think the standard should be higher?

JUROR NO. 9: I think they should be the same.

MR. HUMPHREYS: Okay. All right. You understand that in a murder case you're probably going to be hearing a lot more evidence than in a simpler type of criminal case involving say trespass or shoplifting? Okay. Do you think you would be able to evaluate all of the evidence that came in and reach a verdict?

JUROR SEAT NO. 9: Yes, I could.

MR. HUMPHREYS: All right. One last area. You indicated in response to question 78 I might have a problem understanding the language spoken in the courtroom.

JUROR SEAT NO. 9: Yes.

MR. HUMPHREYS: For what it's worth, I sometimes have problems understanding the language spoken in courtrooms too. Could you elaborate a little bit on what you meant by that?

JUROR SEAT NO. 9: Yeah. I, for example, if you have your psychiatrist come in and he throws out these long words, I don't want to sit here and say, Judge, what did he say, you know.

THE COURT: Believe it or not, I often ask jurors if you're selected as a juror to raise your hand if you don't

understand the word if the attorneys don't ask the person to explain it. And if that is the issue, you're entitled to raise your hand and say I don't understand that word.

JUROR SEAT NO. 9: Okay.

THE COURT: We don't want you to be going to the jury room having to take a medical dictionary with you in order to figure out what's going on.

JUROR SEAT NO. 9: If that's the case I would have no problem.

MR. HUMPHREYS: Okay. So what you were referring to in that question was the technical language that some people use.

JUROR SEAT NO. 9: Yes.

MR. HUMPHREYS: Thank you, Mr. Aylers. That's all I had. Pass for cause.

THE COURT: Very well. People's peremptory.

MR. WOLFSON: I'll thank and excuse Mr. Chaney.

THE COURT: Mr. Chaney, thank you for coming.

THE CLERK: David Southern.

THE COURT: Good morning, sir.

JUROR SEAT NO. 8: Good morning.

THE COURT: You have heard all the questions that have been asked so far?

JUROR SEAT NO. 8: I sure have, Your Honor.

THE COURT: Any questions or any comments you wanted to make if you ended up where you are right now?

JUROR SEAT NO. 8: Well, it's been an education for me. It's like taking law 101. There is a lot of terms that I wasn't familiar with before coming into the chambers. And after hearing the same repeated definitions over and over, it's been very helpful.

THE COURT: All right. That's one of the purposes of doing it is to. Do you feel at this point that you have any prejudices for or against either side of the case at this point?

JUROR SEAT NO. 8: I have no feelings one way or the other.

THE COURT: All right. And you have obviously heard a lot about this business of insanity and about the

ability to form intent, or not the ability, but whether in fact somebody has an intent to kill another person or has in fact thought about or planned out any aspect of the crime. These are all things that you're going to hear about. Do you feel that at this point you have an open mind when it comes to listening to these concepts and listening to what sometimes can be -- let's, well, as Mr. Aylers said, sometimes confusing psychiatric testimony. Do you think that with some guidance from the psychiatrists and the attorneys and the court that you could fairly evaluate that kind of evidence?

JUROR SEAT NO. 8: I believe I can with the right instructions as to where to put the evidence and what block or what window is to be considered under certain conditions.

THE COURT: All right. You understand that one of the functions you have as a juror and your main function is to decide what the facts are to the best of your ability. Do you think that you would have any difficulty coming to a collusion in your own mind as to what the facts are?

JUROR SEAT NO. 8: I don't believe I would have a problem with that.

THE COURT: All right. Do you understand that one of those -- the instruction basically says that you as the jurors are the judges of the believability of the witnesses or essentially of the accuracy of their testimony. Do you understand that that's one of your main functions? Do you know of any reason why you couldn't do that?

JUROR SEAT NO. 8: There is no reason why I couldn't do it.

THE COURT: All right. And do you understand that in the context of the definition or the use of this business about circumstantial evidence, one of the problems is is that we hear for some reason Hollywood has never been able to give up on the idea of circumstantial evidence and they're they used to talk about it in negative terms in Perry Mason and other places.

You understand that none of that has any bearing in here in a courtroom?

JUROR SEAT NO. 8: I understand that.

THE COURT: All right. The other thing is is that in deciding whether inferences are reasonable or unreasonable, you have heard both attorneys talk about. Is there are two reasonable interpretations of the evidence or is there one reasonable and one or more that are unreasonable. Do you understand that in deciding what's reasonable and unreasonable you have to use your common sense and you have to use your ability to decide what's you believe rings true and what doesn't?

JUROR SEAT NO. 8: You have to base it on the facts as you see it.

THE COURT: As you see it, all right. Mr. Wolfson.

MR. WOLFSON: Thank you, Your Honor. How are you today, Mr. Southern?

JUROR SEAT NO. 8: Fine, sir.

MR. WOLFSON: You have heard us repeat the same thing over and over?

JUROR SEAT NO. 8: It's been very educational.

MR. WOLFSON: Not a little bit boring?

JUROR SEAT NO. 8: Not really. It's a new experience for me.

MR. WOLFSON: You answered question 57 yes. Question 57 is the question that do you have any feeling that a person who kills his own child must necessarily be mentally ill or crazy. Now you added I can't read the first part because of the --

THE COURT: Normal.

MR. HUMPHREYS: Normal healthy.

MR. WOLFSON: Thank you. Normal healthy parents don't kill their children. And I'd suspect mental problems. You have also heard us talking about legal insanity and its definition. There will be psychiatrists. They may or may not agree. If there are some indication of mental problems, but you don't believe the problems reach the degree of the qualifying as legal insanity, would

you have any problem there following the legal insanity instruction?

JUROR SEAT NO. 8: Not now, after it's been explained the way it has been in court.

MR. WOLFSON: Also, I think we have talked about degrees of mental problems. Would you want to feel automatically if a person was suffering from some mental disease or defect that his mind is such that he could not form intent automatically without hearing the nature and degree, intent, premeditate or deliberate just by virtue of the fact there is some mental problem?

JUROR SEAT NO. 8: Would you repeat the question?

MR. WOLFSON: We're, as we have said earlier a number of times, we're not dealing with a who done it.

JUROR SEAT NO. 8: No.

MR. WOLFSON: We know what was done. We know how it was done.

JUROR SEAT NO. 8: Right.

MR. WOLFSON: The issue is whether or not there was the required mental state for the defendant to be guilty of a certain of the crime alleged. And one mental state requires an intent. And it's possible that we might hear evidence that the defendant admitted or stated his intent. Another mental state requires premeditation, planning, deliberation, thinking about it. If you just heard some evidence of some mental problem, just the fact there is a mental problem, would you automatically say well there is a mental problem; therefore, there must not be deliberation, premeditation, the required mental states.

JUROR SEAT NO. 8: You would have to put the facts in each window as defined by the judge as to where it would fit is the way I see. You just can't give a blanket.

MR. WOLFSON: And you're absolutely correct. Without knowing the extent, without knowing the facts, you can't answer that question.

JUROR SEAT NO. 8: No.

MR. WOLFSON: You have to know -- you'll agree that mental problems are by degree.

JUROR SEAT NO. 8: They are.

MR. WOLFSON: And you agree or understand that many people who commit criminal acts and who are convicted of criminal acts have some degree of mental problem?

JUROR SEAT NO. 8: I understand that.

MR. WOLFSON: And you'll be able to put aside that factor to the degree that you're going to listen to all the facts?

JUROR SEAT NO. 8: I'll listen to all the facts because all shades are gray.

MR. WOLFSON: Sympathy. Because you feel there might be a mental problem, would that create some sympathy toward the defendant or against the defendant just because of that suspicion?

JUROR SEAT NO. 8: No, I try to be objective and listen to all the facts on both sides.

MR. WOLFSON: And if you do either form a bias or sympathy either way, can you set that aside and judge the case by the law and the facts?

JUROR SEAT NO. 8: I believe I can.

MR. WOLFSON: Would you require the People to prove there was a motive --

JUROR SEAT NO. 8: (Nods negatively).

MR. WOLFSON: -- if you're instructed that motive is not an element?

JUROR SEAT NO. 8: That's what I learned earlier that it's not part of your.

MR. WOLFSON: And would you if you think there was a motive or a lack of motive, would you follow the instruction and utilize that in your deliberations?

JUROR SEAT NO. 8: I sure would.

MR. WOLFSON: If the motive, if there appears to be a motive, but it's a bizarre and kind of irrational or not or -- I hate to use the term crazy, but not --

THE COURT: Not normal.

MR. WOLFSON: A Motive that makes sense. Not a normal motive, but a motive. Would you throw it out

because it doesn't make sense or would you factor, be able to factor that in?

JUROR SEAT NO. 8: I'd have to take it in with all of the evidence.

MR. WOLFSON: Thank you. I'll pass for cause. Thank you very much.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Thank you. Good morning, Mr. Southern.

JUROR SEAT NO. 8: Good morning, Mr. Humphreys.

MR. HUMPHREYS: For about another 15 minutes. From where you were sitting in the courtroom this morning, did you hear the areas I talked about with some of the other panel members?

JUROR SEAT NO. 8: I heard everything you said.

MR. HUMPHREYS: Great. I'm still projecting I guess.

JUROR SEAT NO. 8: Coming through loud and clear.

THE COURT: He was down in the front row, counsel.

MR. HUMPHREYS: That always helps too. Did any of the areas I talked about raise any red flags or warning lights?

JUROR SEAT NO. 8: Not in my mind, no.

THE COURT: You appreciate that as a judge, in effect a judge, we don't give you black robes but you're judges nonetheless, nobody can tell you how to decide the case. The judge will give you instructions which will tell you what the law is and what law may apply to the facts if you find those facts to have been established. But it's going to be your job to decide if any facts have been proven to your satisfaction beyond a reasonable doubt. And then it's going to be your job to apply the law to the facts, and hopefully reach a decision. Mr. Wolfson and I will suggest what inferences can be drawn from the facts. But you're not bound to accept it, accept what we argued because we're advocates. What we say is not evidence.

It will be up to you and eleven fellow jurors hopefully reach a consensus. Do you think you can do that?

JUROR SEAT NO. 8: I think I can.

THE COURT: All right. And I don't think I had any any other areas to talk to you about. I thank you very much. Pass for cause.

THE COURT: Very well. People's peremptory.

MR. WOLFSON: It is?

MR. HUMPHREYS: I thought it was mine.

THE COURT: Just a minute. Oh, I'm sorry, I didn't include Mr. Chaney. All right. It is yours, Mr. Humphreys.

MR. HUMPHREYS: We'll thank and excuse Juror No. 7, Mrs. Bower.

THE COURT: Mrs. Bower, thank you for coming.

THE CLERK: George Roar.

THE COURT: Good morning, Mr. Roar.

JUROR SEAT NO. 7: Good morning.

THE COURT: I guess we'll start with one question I do know, and that is you -- at least I believe -- are an attorney licensed to practice law?

JUROR SEAT NO. 7: I am an inactive member of the Board.

THE COURT: Inactive at this time, all right. Do you think that, first of all, did you ever practice criminal law?

JUROR SEAT NO. 7: No, I did not.

THE COURT: All right. And do you have any difficulty -- well, first of all, do you know either of the attorneys?

JUROR SEAT NO. 7: Yes, I do. I'm acquainted with Mr. Wolfson.

THE COURT: All right.

JUROR SEAT NO. 7: Not on a professional basis.

THE COURT: All right. And do you feel that that acquaintanceship would in any way affect your ability to deliberate in this particular case as a juror?

JUROR SEAT NO. 7: No, I do not.

THE COURT: All right. Do you have frequent contact with Mr. Wolfson say over the last few years?

JUROR SEAT NO. 7: No, very infrequent.

THE COURT: All right. And was there a particular type of organization through which you had contact?

JUROR SEAT NO. 7: Primarily through a political organization.

THE COURT: And you have heard all the questions that have been asked?

JUROR SEAT NO. 7: Yes, I have.

THE COURT: And are there any questions that you felt you needed to specifically comment upon at this point?

JUROR SEAT NO. 7: No, there are not.

THE COURT: And you believe that you could follow the instructions of the court and fairly and accurately deliberate if you were chosen as a juror?

JUROR SEAT NO. 7: Yes, I do.

THE COURT: All right. Mr. Wolfson.

MR. WOLFSON: Or should I say Mr. Roar or judge Roar.

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: You're an administrative law judge?

JUROR SEAT NO. 7: That's correct.

MR. WOLFSON: And you work for the state?

JUROR SEAT NO. 7: Yes, I do.

MR. WOLFSON: You have served on a jury before?

JUROR SEAT NO. 7: Yes, in a civil matter.

MR. WOLFSON: And you seem to indicate you had some concerns about the jurors seeking you out following your advice.

JUROR SEAT NO. 7: It was a concern termpering my view in my deliberations. Not monopolizing the deliberations. If you will note, I was also the foreman at that time.

MR. WOLFSON: Were you a judge then or administrative law judge then?

JUROR SEAT NO. 7: No, I was working as a lawyer at that time.

MR. WOLFSON: What area do you work in for the state?

JUROR SEAT NO. 7: Well, I work for an administrative appeals board reviewing appeals from decisions of other judges. That's my primary function. I also do preside at hearings.

MR. WOLFSON: The nature of the hearings?

JUROR SEAT NO. 7: They have to do with unemployment insurance, disability insurance and employer taxes.

MR. WOLFSON: Do you have any experience at all in criminal law?

JUROR SEAT NO. 7: No, I do not.

MR. WOLFSON: That's your brother's department?

JUROR SEAT NO. 7: That's my brother's department. That's correct.

MR. WOLFSON: And he works in Sacramento as a --

JUROR SEAT NO. 7: He's an assistant public defender in Sacramento.

MR. WOLFSON: Do you ever talk to him about criminal cases?

JUROR SEAT NO. 7: Not in detail, no. Actually, we very rarely discuss his work.

MR. WOLFSON: And you were last a juror in the civil trial you just mentioned that the jury basically apparently elected you foreman and relied on your knowledge.

JUROR SEAT NO. 7: Oh, no, I don't think they relied on my knowledge. That was a concern. But, no, I think the deliberations were active. There was a lot of discussion.

MR. WOLFSON: Is there any -- we have talked all morning and part of yesterday on about specific issues, one of those being the differentiation between mental illness and legal insanity. Do you have any concerns about your ability to differentiate?

JUROR SEAT NO. 7: No, I don't.

MR. WOLFSON: Any disagreement with that with what's known as the M'Naghten rule?

JUROR SEAT NO. 7: No, I don't.

MR. WOLFSON: You know the M'Naghten rule has not always been the law. It's changed through the years. Is there any concerns in that area?

JUROR SEAT NO. 7: I have no concerns in that area. The last time I heard of the M'Naghten rule I believe was in law school which was many years ago.

MR. WOLFSON: Have you ever handled a criminal case?

JUROR SEAT NO. 7: No, I have not.

MR. WOLFSON: Number 57 regarding apparent person who kills his own child, you answered yes. And then you mentioned that you can differentiate between or would be willing to mental illness and insanity. Can you conceive of situations where a person could intentionally kill his or her own child when the person is not mentally ill?

JUROR SEAT NO. 7: I can in limited circumstances.

MR. WOLFSON: And could you conceive of situations where a person is just simply so fed up with either their life or what they see as the conditions of the world and direction of the country where they become depressed and suicidal decide to take somebody else with them?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: Would you accept that that could be a motive for a act?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: If a motive and you're aware, and if you weren't before probably aware now based on our discussions of beating the same issues over and over that motive is not an element. It's not something the People have to prove in order to prove a crime.

JUROR SEAT NO. 7: I wasn't before. And I was before and am again.

MR. WOLFSON: Do you have any disagreement with that concept?

JUROR SEAT NO. 7: No, I don't.

MR. WOLFSON: However, as counsel pointed out, you can consider either motive or absence of motive in determining whether or not you believe the person committed a crime. Do you have any problem with that concept?

JUROR SEAT NO. 7: No, I don't.

MR. WOLFSON: You feel you can follow that instruction?

JUROR SEAT NO. 7: Yes, I do.

MR. WOLFSON: And as I asked previously, will you agree or do you have a problem with the concept that the motive might be a motive to somebody, but it may not make sense; it may be irrational?

JUROR SEAT NO. 7: I do not have any problem with that concept, no.

MR. WOLFSON: But maybe the motive.

JUROR SEAT NO. 7: I'm sorry?

MR. WOLFSON: It may be the motive?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: And you would take it into consideration?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: Thank you. I have nothing further. Pass Mr. Roar for cause.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Thank you, Your Honor. Mr. Roar, I may have missed it, but what type of law did you practice before you became a judge?

JUROR SEAT NO. 7: Administrative law.

MR. HUMPHREYS: Okay. Was that for the same department?

JUROR SEAT NO. 7: Well, it was for the department whose decisions are appealed and reviewed by the agency for whom I work at this time.

MR. HUMPHREYS: Now your brother Tom works for Sacramento County and is one of the assistant PDs; right?

JUROR SEAT NO. 7: He's an assistant P.D., yes.

MR. HUMPHREYS: And you said you never really talk shop with him?

JUROR SEAT NO. 7: No, not really.

MR. HUMPHREYS: Do you have any opinions based on any conversations you may have had with him about his office as to as to the guilt or non-guilt of his clients?

JUROR SEAT NO. 7: I'm questioning my own mind whether I do. I don't believe that I do, no.

MR. HUMPHREYS: Okay. I guess.

JUROR SEAT NO. 7: I guess my --

MR. HUMPHREYS: Another way of putting it, I suppose, is -- and I ask it a different way with other jurors, but some folks can read about a particular case and just from a narrow set of facts, usually the ones that the newspapers print, they can decide early on whether that person is guilty or not guilty. But as you're aware, in the law we have degrees of difference between various classes and homicide for one thing; correct? And here we're dealing with a factual scenario that involves rather emotionally charged event. Based on any conversations you may have had with your brother, do you think you have any sort of tendency to -- how shall I put this -- jump to the worst possible conclusion about Mr. Patterson just based on what you have heard so far about this case?

JUROR SEAT NO. 7: Well, I can answer the question this way. I make no inferences about Mr. Patterson's guilt or lack of guilt due to the fact that he's being represented by a public defender.

MR. HUMPHREYS: All right.

JUROR SEAT NO. 7: My brother's clients I think are his clients due to indigence. And it may be that there are -- it may be a reasonable inference that -- well one may make a reasonable inference, one may make many reasonable inferences about their guilt or not guilt due to

their indigence. But, in other words, I'm not transferring any conclusion that I might arrive about his clients to this case. I don't know if that answers your question or not.

MR. HUMPHREYS: I think it does. One last area. On question number 70 where we ask whether anyone would have difficulty viewing and considering graphic photographs of the crime scene or the autopsy, you gave an answer that I think came from the heart. Is there anyone who wouldn't? People may have difficulty viewing photographs like that which is understandable. Nonetheless, do you think that any difficulty you might have in looking at the photograph in studying the photograph if either Mr. Wolfson or I would suggest to you there is something in that photograph you really need to see, do you think that studying a photograph like that no matter how distasteful would affect your ability to be fair and impartial?

JUROR SEAT NO. 7: No, I don't.

MR. HUMPHREYS: All right. Thank you. Pass for cause.

THE COURT: All right. It's now the People's peremptory. And we'll -- if you have one to exercise, we'll let you do that before the noon recess and then proceed after.

MR. WOLFSON: I'll thank and excuse Mrs. Vaughn.

THE COURT: Mrs. Vaughn. Thank you for coming. All right.

THE CLERK: Larue Undercoffer.

THE COURT: All right. Now that you're seated, we'll take the noon recess. We'll see you all back here at 1:30. Remember my prior admonition not to discuss the case with anyone or allow yourselves to become exposed to news accounts of it.

(Whereupon, a lunch recess was taken).

THE COURT: Court will be in session in People versus Patterson, number 49140. Jurors are seated, and defendant is present with counsel.

Let's see. I think we're up to Mr. Undercoffer. Good afternoon.

JUROR SEAT NO. 2: Afternoon, Judge.

THE COURT: I don't think it's any secret that you have spent a fair number of years working for the County of Nevada. And I don't know your current status. Are you retired at this point or are you still.

JUROR SEAT NO. 2: Yes, Your Honor, I'm retired as of the 30th of June of this year.

THE COURT: Okay. And you worked in which department?

JUROR SEAT NO. 2: I was working -- my last assignment I was the acting building inspector. Prior to that I was a project manager to the construction of Wayne Brown Correctional Facility.

THE COURT: Anything about those experiences that would affect your ability to serve as a juror in this case that you can think of?

JUROR SEAT NO. 2: Yes, Your Honor, there are. I have over the past seven years have been affiliated with law enforcement and the correctional officers. And in this particular case I have already formed an opinion.

THE COURT: Okay. Well, perhaps we -- counsel want to stipulate to excuse Mr. Undercoffer?

MR. HUMPHREYS: Yes.

MR. WOLFSON: Yes, Your Honor.

THE COURT: All right then, you're excused. Thank you, sir.

THE CLERK: Robert Beilby.

THE COURT: Good afternoon, Mr. Beilby.

JUROR SEAT NO. 2: Good afternoon, sir.

THE COURT: Is that the way to pronounce your name?

JUROR SEAT NO. 2: Yes.

THE COURT: You have heard the questions that I have asked and the attorneys have asked the various jurors before you?

JUROR SEAT NO. 2: I have.

THE COURT: And are there any that you felt you would want to specifically comment upon or anything else

that you would want us to know about that might touch on your qualifications to act in this case?

JUROR SEAT NO. 2: The only thing is that on the questionnaire I'm a manic-depressive. That's the only thing. Other than that, I'm fine.

THE COURT: Okay. And, in other words, you have been diagnosed as having that disorder?

JUROR SEAT NO. 2: Ten years ago.

THE COURT: All right. And are you presently taking any medication for it, or is it.

JUROR SEAT NO. 2: I am.

THE COURT: Do you feel that if the evidence were to show in this case that Mr. Patterson -- and I don't know -- was diagnosed as manic-depressive either after this incident or before it, that that would prejudice you either for or against him?

JUROR SEAT NO. 2: Not really, no.

THE COURT: All right. Do you believe that manic-depressive disorder is something that encompasses a large variety of different levels and behaviors?

JUROR SEAT NO. 2: Sometimes, I think.

THE COURT: Okay. Well, certainly we know that not all manic depressives kill people under any circumstances. So I assume you would accept that statement.

JUROR SEAT NO. 2: Right.

THE COURT: All right. From what you have heard about the instructions about the insanity issues and the fact that a person can be mentally ill and still sane and can be mentally ill and still form the intent to kill a person or to act with what we call reckless indifference to human life, do you accept that those are at least propositions of the law that may apply or may not depending on how you view the facts?

JUROR SEAT NO. 2: I do.

THE COURT: All right. Mr. Wolfson.

MR. WOLFSON: How are you today?

JUROR SEAT NO. 2: Better.

MR. WOLFSON: As the day wears on?

JUROR SEAT NO. 2: Better than nothing.

MR. WOLFSON: Better as the day wears on probably?

JUROR SEAT NO. 2: Yeah.

MR. WOLFSON: Thank you for being as candid as you have been, both on your questionnaire and in response to His Honor's questions. Would you prefer to discuss some of these issues in chambers?

JUROR SEAT NO. 2: No, no, not particularly.

MR. WOLFSON: Because there are some questions that need to be asked. We could do that, Your Honor. It probably would be.

THE COURT: If he wants to answer them here, that's fine.

MR. WOLFSON: You did answer yes to question 57 which deals with your opinion of whether or not it would necessarily -- whether somebody who killed a child would necessarily be mentally ill. You heard us speak of the difference between mental illness and the legal definition of insanity?

JUROR SEAT NO. 2: Right.

MR. WOLFSON: You have heard the judge read the instruction, heard counsel and myself discuss it a number of times. Do you feel that you have heard enough to believe you can, you do understand it?

JUROR SEAT NO. 2: Sure.

MR. WOLFSON: Do you agree that a person can be mentally ill under the law and not insane?

JUROR SEAT NO. 2: Sure.

MR. WOLFSON: Going back to question 57. Do you feel you have a belief after you have heard what facts or what we said about the circumstances that are surrounding this case; in other words, we're not dealing with a killing in self-defense or an accident.

JUROR SEAT NO. 2: Right.

MR. WOLFSON: But we're dealing with something other killing as a result of actions taken by the defendant's purposeful actions. Do you feel that under those

circumstances a person would have to be mentally ill to kill a child his own child?

JUROR SEAT NO. 2: I would think so.

MR. WOLFSON: What?

JUROR SEAT NO. 2: I would think so.

MR. WOLFSON: Do you think you can separate that feeling from what you have to do in this case as far as determining legal insanity?

JUROR SEAT NO. 2: Sure.

MR. WOLFSON: And do you think you can separate that belief from feeling when you decide whether or not the defendant formed or mental state?

JUROR SEAT NO. 2: I don't really follow your question.

MR. WOLFSON: Well, there is more than a killing that we're concerned with. We're concerned with whether or not at the time of the killing the defendant had the intent to kill whether the defendant premeditated and deliberated.

JUROR SEAT NO. 2: Right.

MR. WOLFSON: Did you read -- Judge, did you read the premeditation and deliberation instruction previously? I can't remember.

THE COURT: No, I have not. I was just starting to look at them.

MR. WOLFSON: Let's go on and come back to that.

JUROR SEAT NO. 2: Okay.

MR. WOLFSON: Also, as His Honor indicated, if the evidence should indicate at least some evidence that defendant in this case was suffering from bipolar disorder which is manic-depressive, would that affect your ability to judge the facts and apply the law?

JUROR SEAT NO. 2: No.

MR. WOLFSON: In fact --

JUROR SEAT NO. 2: Could I ask you a question, sir? Is that permissible?

THE COURT: It depends. If it will assist you in understanding your duties as a juror, I suppose you can ask the question.

JUROR SEAT NO. 2: Do you understand what a manic depressive is in your own mind?

THE COURT: Well, one of the questions that we have to decide is let's assume that you have an understanding of what that is and one of the doctors comes in here and testifies differently what would you do as a juror then.

JUROR SEAT NO. 2: Different than what I believe, Judge?

THE COURT: Correct. In other words, as a juror you have to follow -- you can reject evidence that you don't believe as a juror, but you cannot do it solely on the basis that you have a professional opinion that differs with that of the witnesses. Do you see what I'm saying?

JUROR SEAT NO. 2: Right.

THE COURT: Do you think you could do that?

JUROR SEAT NO. 2: Sure.

MR. WOLFSON: My understanding is that it's a disorder that is prevalent in a fairly significant percentage of the population. Is that your understanding also?

JUROR SEAT NO. 2: Right. It's a chemical imbalance in the brain.

MR. WOLFSON: And can be treated.

JUROR SEAT NO. 2: With the proper.

MR. WOLFSON: Medications.

JUROR SEAT NO. 2: Right.

MR. WOLFSON: My understanding is that it's one to two percent of the population or something of that magnitude. Is that what you understand also?

JUROR SEAT NO. 2: The last one I have read was four-and-a-half percent.

MR. WOLFSON: Okay. I'm old. I must be reading some older literature. And there are numerous people who suffer from the disorder who are not treated at all. But is it your understanding that those folks do function?

JUROR SEAT NO. 2: Sure.

MR. WOLFSON: And you certainly are dealing with a large percent of the population that is suffering from the disorder that don't commit acts that lead them to court.

If you see from the evidence despite the fact there might be a diagnosis of manic disorder or bipolar disorder and manic-depressive disorder that there was a -- let me just strike that question. Would you apply your own experience and allow it to outweigh what you heard in court as far as the evidence of the Defendant's --

JUROR SEAT NO. 2: No.

MR. WOLFSON: -- actions and his ability by his actions to reason and think and conduct himself?

JUROR SEAT NO. 2: (Nods negatively).

MR. WOLFSON: Would you hold it against the defendant if the evidence indicated that there was a disorder of some sort, medication was prescribed and defendant didn't follow his doctors advice take the medication?

JUROR SEAT NO. 2: If he --

MR. HUMPHREYS: Your Honor, excuse me. I'm going to object to the form of the question. It's asking -- I think it's asking the juror to commit to a particular view of the evidence.

THE COURT: All right. Sustained. Actually, it was asked in such a way as the answer would favor your client. But if you object, I'll sustain the objection in any event. You may move on.

MR. WOLFSON: Well, okay. Because you have been diagnosed with the disorder that possibly you believe after you hear the evidence the defendant might be suffering from, would that create any sympathy in your mind, that fact alone.

JUROR SEAT NO. 2: Not particularly, no.

MR. WOLFSON: And perhaps the entire circumstances of the case would make you feel that you're just simply biased against the defendant?

JUROR SEAT NO. 2: No, I take all the evidence and weigh it.

MR. WOLFSON: And if you did for what are reason feel sympathetic toward the defendant, would you set that aside?

JUROR SEAT NO. 2: Yes.

MR. WOLFSON: I have nothing further. I'll pass Mr. Beilby for cause.

THE COURT: All right. Mr. Humphreys.

MR. HUMPHREYS: Thank you, Your Honor. How are you this afternoon, Mr. Beilby? Is it pronounced Beilby or Beilby?

JUROR SEAT NO. 2: Beilby.

MR. HUMPHREYS: Excuse me. I noted from your questionnaire you have a degree in mortuary science.

JUROR SEAT NO. 2: That's right.

MR. HUMPHREYS: I take it you have attended autopsies in the past?

JUROR SEAT NO. 2: I guess. I performed over 1,100 when I was practicing.

MR. HUMPHREYS: Okay.

JUROR SEAT NO. 2: With physicians.

MR. HUMPHREYS: All right. We're undoubtedly going to have another expert witness who is not a psychiatrist, but who is an M.D. a pathologist. The pathologist is going to offer testimony dealing with his findings from an autopsy. If any of his testimony concerning procedures or significance of particular types of evidence doesn't square with your recollection what autopsies are supposed to be like, would you have any problem setting aside your own knowledge?

JUROR SEAT NO. 2: It would be his opinion like an attorney.

MR. HUMPHREYS: Okay, all right. And you would weigh the reasons for or the reasons of any supporting the opinion in deciding what weight to give it?

JUROR SEAT NO. 2: Right.

MR. HUMPHREYS: Okay. There was one question on the questionnaire that asked do you feel you can give both the defendant and the People a fair trial. You marked the box indicating no. Was that a mistake on your part?

JUROR SEAT NO. 2: That certainly was.

MR. HUMPHREYS: In light of the rest of your answers, I thought that was the case. But I just wanted to make sure. Thank you, sir. Pass for cause.

THE COURT: All right. I believe it's the defendant's peremptory at this point.

MR. HUMPHREYS: Yes. We would thank and excuse Juror No. 4, Mr. Hussock.

THE COURT: Mr. Hussock, thank you for coming.

THE CLERK: Al Flores.

THE COURT: Good afternoon.

JUROR SEAT NO. 4: Good afternoon.

THE COURT: Since you have heard all of this repeatedly, I'm not going to repeat any of it. Is there anything you feel that you need to tell us that we that either would assist the attorneys or myself in evaluating your qualifications to serve in this case?

JUROR SEAT NO. 4: No, sir.

THE COURT: All right. Have you heard anything about it before?

JUROR SEAT NO. 4: Vaguely on channel three news.

THE COURT: The evening news there?

JUROR SEAT NO. 4: Yes.

THE COURT: All right. Is there anything that sticks out in your mind from that news cast that you could not set aside in making your decision?

JUROR SEAT NO. 4: There is nothing.

THE COURT: All right. Mr. Wolfson.

MR. WOLFSON: How are you today?

JUROR SEAT NO. 4: Fine, thank you.

MR. WOLFSON: You are an owner or employed by the Northern Queen Motel.

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: Would the trial this time of the year going into the holiday season create a hardship for you?

JUROR SEAT NO. 4: No, it wouldn't.

MR. WOLFSON: Would you be able to -- would you be able to direct usual attention to what's happening in court and not --

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: -- be distracted by the big motel?

JUROR SEAT NO. 4: No, I have enough help that could take over what's going on.

MR. WOLFSON: You marked that you know Mike Hanson.

JUROR SEAT NO. 4: Only as a patron to the restaurant. This was three years ago.

MR. WOLFSON: Okay.

JUROR SEAT NO. 4: And that was it.

MR. WOLFSON: Just a brief acquaintanceship.

JUROR SEAT NO. 4: Just at a customer, yes.

MR. WOLFSON: Sgt. Hanson most likely -- and I say most likely. There could be something that happened between now and the beginning of the trial -- is the investigating officer on the case. That just your acquaintanceship with him.

JUROR SEAT NO. 4: I have not confronted Mr. Hanson in a couple of years. And I'm no longer a host in the cafe. So it would be very impossible for me to meet up with him. Unless it's at the store or something.

MR. WOLFSON: Question 39 would you reject circumstantial evidence as a means of proving specific intent or mental -- I'm sorry, say that over. 38. Do you agree circumstantial evidence may be the only way to ascertain a person's intent or mental state. And you said no. Let me ask it a different way. Do you believe there are certain circumstances or situations where circumstantial evidence might be the only way to determine or ascertain somebody's intent or mental state.

JUROR SEAT NO. 4: Well, this is all new to me. After listening to the judge and what he had stated about circumstantial evidence, I would go along with the statement that he had stated.

MR. WOLFSON: It is a difficult concept. You heard His Honor's explanation and my.

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: We're just concerned there seems to be as His Honor indicated a bias that seems to come through Hollywood in circumstantial evidence that very often we both agree you can't open up somebody's head and look inside their mind. And you have to look at what they do or what they say, although what they say is a little closer. And you agree with that?

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: And the question we have dwelled on is question 57 regarding if a person must necessarily be mentally ill or use the word crazy if that person were to kill his or her child. And you answered it would appear that way. In putting myself in killer's shoes, something would have to drive me that way. Which opens up a series of concerns which would we have discussed with other potential jurors. You would agree that a seemingly crazy act can be committed by someone who is not crazy?

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: You would agree that if a person were to act on a motive that you don't understand and seemed bizarre it still could be a motive for [KOG/] what was done.

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: You wouldn't say that can't be and set it aside if the evidence indicated otherwise?

JUROR SEAT NO. 4: Right.

MR. WOLFSON: Do you also agree that a person can be mentally ill when or suffer from a mental disease or defect without being legally insane?

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: And do you have any disagreement with the definition that was read by His Honor, that M'Naghten rule?

JUROR SEAT NO. 4: No.

MR. WOLFSON: Do you think you can give both the defendant and the People the benefit of your attention and a fair trial?

JUROR SEAT NO. 4: Yes.

MR. WOLFSON: I'll pass Mr. Flores for cause.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Thank you. Good afternoon, Mr. Flores.

JUROR SEAT NO. 4: Good afternoon.

MR. HUMPHREYS: I note from your questionnaire that you worked for the animal control department for a period of time. When was that?

JUROR SEAT NO. 4: Pardon me?

MR. HUMPHREYS: You worked for animal control for a period of time.

JUROR SEAT NO. 4: Yes.

MR. HUMPHREYS: When was that?

JUROR SEAT NO. 4: That was from 1974 till '78.

MR. HUMPHREYS: Okay. And you had peace officer status then?

JUROR SEAT NO. 4: It was a course I had to take, yes.

MR. HUMPHREYS: Were you actually classified as a peace officer, or did you just take the course?

JUROR SEAT NO. 4: Yes.

MR. HUMPHREYS: Okay. Is there anything about that background, that particular part of your employment history that in your mind could affect your ability to be fair and impartial?

JUROR SEAT NO. 4: There is nothing, no. It was so long ago.

MR. HUMPHREYS: I was back in law school in '74. It seems like a long time ago now.

THE COURT: I was in this courtroom in 1974.

MR. HUMPHREYS: Also had a full head of hair then.

THE COURT: Are you talking about me? No.

MR. HUMPHREYS: No, I'm talking about myself. I think everybody agrees or pretty much everybody who sat in the box has agreed that the act of somebody who kills a child may be an indication of mental illness, but there can be other reasons as well that can explain it. And your initial reaction I think was there must be

something wrong with the person. I think that would be a common reaction of anybody if they heard with a parent killing a child without anything more. Do you think he would have any difficulty listening to all the evidence concerning the homicide and what led up to it, what may have been what may have led up to it actually and, you know, make a decision. Do you think you could do this.

JUROR SEAT NO. 4: I don't think it would be a problem.

MR. HUMPHREYS: Okay. You heard the explanation I gave this morning of circumstantial evidence?

JUROR SEAT NO. 4: Yes.

MR. HUMPHREYS: And part of that explanation said that if you have two inferences that can be drawn from a particular item of circumstantial evidence, both of them are equally reasonable. One points towards guilt, one points towards not guilt. That the law in that circumstance requires you to give the defendant the benefit of the doubt and adopt that finding that points towards not guilty.

Or in a particular circumstance it can also -- there is also an instruction that says that can -- oh, no, I'm not going to get into that. Do you have any problem with an instruction that in effect tells you in case of a tie on circumstantial evidence, it has to be resolved in favor of the defendant?

JUROR SEAT NO. 4: I have no problem.

MR. HUMPHREYS: On the other hand, the instruction would also tell you that if one interpretation of the evidence is unreasonable and the other is reasonable, it's your duty then to reject the unreasonable one. Do you think could you do that?

JUROR SEAT NO. 4: I think so, yes.

MR. HUMPHREYS: All right. Thank you, Mr. Flores. Pass for cause.

THE COURT: All right. Peremptory lies with the People.

MR. WOLFSON: I don't know if I got mixed up or perhaps the court did. How many peremptories are we?

THE COURT: Number six. You have each exercised five.

MR. WOLFSON: Okay. I'll thank and excuse Mr. Roar.

THE COURT: Mr. Roar, thank you for coming.

JUROR SEAT NO. 7: Thank you very much.

THE CLERK: David Lake.

THE COURT: Good afternoon.

JUROR SEAT NO. 7: Good afternoon.

THE COURT: You have heard all the questions?

JUROR SEAT NO. 7: Sure have.

THE COURT: Probably more than once.

JUROR SEAT NO. 7: As many as everybody else around here.

THE COURT: Okay. Anything from what you have heard or anything in your background you can think of as you sit here that would -- that you feel we should know about concerning your qualifications to serve as a juror, first of all?

JUROR SEAT NO. 7: No.

THE COURT: Okay. You understand that your primary function as a juror is to decide to the best of your ability what happened on a particular date when this crime allegedly occurred? Do you understand that?

JUROR SEAT NO. 7: Yes.

THE COURT: And do you understand that included in that process is evaluating and determining what essentially Mr. Patterson's state of mind was at the time that this incident occurred. Do you understand that as well?

JUROR SEAT NO. 7: Yes.

THE COURT: And that you're going to hear evidence concerning these issues from people who -- some people who were there at the time and some who were not such as psychiatrists. You don't normally have things like this occur with a panel of psychiatrists standing around watching. So you're going to have to evaluate

expert testimony as we call it. Do you feel that you have any difficulty using your common sense and listening to the facts and judging expert testimony as you would testimony of anyone else?

JUROR SEAT NO. 7: No, I wouldn't.

THE COURT: Does the idea that somebody has a lot of credentials behind their name necessarily put you in awe?

JUROR SEAT NO. 7: Oh, no.

THE COURT: And you understand that in using the circumstantial evidence instruction that the -- you first as jurors, I will instruct you that your first duty is to determine what the facts are and then apply the instructions as they might apply to the facts as you determine. Do you understand that?

JUROR SEAT NO. 7: Yes.

THE COURT: Mr. Wolfson.

MR. WOLFSON: Good afternoon.

JUROR SEAT NO. 7: Good afternoon.

MR. WOLFSON: You answered question 34 which involved if you had any relatives or close friends. Apparently you had -- accused, arrest, charged with a crime -- apparently you had a cousin a few years back?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: Was this cousin close to you?

JUROR SEAT NO. 7: Yes, I have to say he was.

MR. WOLFSON: Was that in this county?

JUROR SEAT NO. 7: The crime occurred I believe in Yuba County -- Yuba City. He was living in this county at the time.

MR. WOLFSON: Apparently it said he committed suicide in jail awaiting trial?

JUROR SEAT NO. 7: The reason I put that in there was obviously they didn't take it to trial, so there was no conclusion to it.

MR. WOLFSON: Right. Did you know anything about the facts?

JUROR SEAT NO. 7: Just what was related to me by family members.

MR. WOLFSON: Is there anything about that experience in that time of your life that might carry over to this case?

JUROR SEAT NO. 7: No, I don't believe so.

MR. WOLFSON: You indicated that you were on a jury previously, and your feelings about jury service are neutral.

JUROR SEAT NO. 7: Yes. Maybe ambivalent. I didn't find it negative at all. I found it educational. But you know, on the other hand, it wasn't a great enlightening situation, something I really enjoyed.

MR. WOLFSON: How long did that jury trial take?

JUROR SEAT NO. 7: The trial I believe was four days. Deliberations were about a day and-a-half.

MR. WOLFSON: Was that in Nevada County?

JUROR SEAT NO. 7: Yes, it was.

MR. WOLFSON: Was that Superior Court upstairs or downstairs.

JUROR SEAT NO. 7: It was upstairs in the old wing. I don't know. The judge was Francis. I don't know if that matters.

MR. WOLFSON: And the jury did not reach a verdict?

JUROR SEAT NO. 7: No. Two of the jury members saw the evidence differently. We just couldn't resolve it.

MR. WOLFSON: We don't have to go into detail. We can't really. You have heard us ask the same questions over and over. Mr. Southern is agreeing. Do you have anything or any different response or any area of concern?

JUROR SEAT NO. 7: No.

MR. WOLFSON: You're employed by Imex?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: Division of Abicus or company owned by Abicus?

JUROR SEAT NO. 7: Well, no. Abicus and Imex are owned by the same large holding company.

MR. WOLFSON: Carlton.

JUROR SEAT NO. 7: Carlton, yes.

MR. WOLFSON: Can they -- would it be a hardship, the time you spend if you're a juror?

JUROR SEAT NO. 7: I don't believe it would. I did talk about this earlier. The schedule I have right at the moment is rather light being that the trial is going to be held three days a week. Most of my work is out of subcontractors. So those two days I can coordinate the activity I think without any problem.

MR. WOLFSON: You are an engineer?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: I asked Mr. Hussock who is no longer here a question regarding the approach engineers often take in analyzing something.

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: Sometimes to death.

JUROR SEAT NO. 7: Yes. Some do.

MR. WOLFSON: Some do. Possibly second guessing.

JUROR SEAT NO. 7: Uh-huh.

MR. WOLFSON: Do you feel that you can listen to a case that's been presented and possibly a defenses that being presented without looking for the cause and second guessing?

JUROR SEAT NO. 7: Yes, I do.

MR. WOLFSON: Deciding how you might have done it?

JUROR SEAT NO. 7: (Nods affirmatively).

MR. WOLFSON: Okay. You agree that there is this kind of swings into the as an engineer you're concerned with mathematics, concerned with precision.

JUROR SEAT NO. 7: I think that's a little bit of a misconception among people that are nonengineers about how unexact engineering actually is. It's probably a lot like how the general population feels about lawyers.

MR. WOLFSON: We'll admit what we do is unexact. I was getting more.

JUROR SEAT NO. 7: Yes, there are a lot of aspects of engineering that require precision. However,

many of the basic decisions involved are very much nonprecise, involve opinion and gut feeling, intuition, things of that nature.

MR. WOLFSON: There is going to be very likely one or more psychiatrists testifying. You were asked the questions, one which related psychiatry and mathematics. You acknowledge in psychiatry what you do -- I don't know how much you know about it, but psychiatry is not an exact science.

JUROR SEAT NO. 7: I would agree with that statement.

MR. WOLFSON: And in rendering the opinions the psychiatrists have to utilize and do utilize information.

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: And some psychiatrists using some types of information and others use other information. It's kind of like a computer. If the information a psychiatrist uses is not accurate, it's like garbage in, garbage out. I think that's the expression. Their opinion may not be accurate. Will you look at the basis of the psychiatrist's opinion, what they used to form that opinion before you decide whether or not to accept the opinion?

JUROR SEAT NO. 7: Yes, I would. The alternative is just to accept what this person says. It's the Gospel truth. I think you have to understand how he arrived at that, weigh that against your own experience.

MR. WOLFSON: You don't know anybody who is listed other than you did list Nevada County sheriff checked and California highway patrol.

JUROR SEAT NO. 7: Yes, my stepfather is a highway patrolman. He's retired. His wife is Nevada County dispatcher, and she's retired.

MR. WOLFSON: All right, thank you. Pass Mr. Lake for cause.

MR. HUMPHREYS: Thank you, Your Honor.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: How are you this afternoon, Mr. Lake?

JUROR SEAT NO. 7: Just fine.

MR. HUMPHREYS: Were you able to hear the subject areas I covered with other members of the panel this morning?

JUROR SEAT NO. 7: Yes.

MR. HUMPHREYS: Did any of the areas I talked about with the other jurors raise any red flags in your mind or cause you to think not --

JUROR SEAT NO. 7: No.

MR. HUMPHREYS: To think you might have answered differently.

JUROR SEAT NO. 7: No.

MR. HUMPHREYS: I noted from your questionnaire you have two children -- one say daughter who is seven, and the other is a son who is ten, I believe.

JUROR SEAT NO. 7: Nine.

MR. HUMPHREYS: Here we're going to be dealing with the homicide of a 10-year-old girl. Because you have young children of your own, do you think there might be a tendency for you to, how shall I phrase it, to react emotionally to the evidence because in your own mind you might connect victim in this case with your own children?

JUROR SEAT NO. 7: I don't think that it would be my reaction. I won't say I won't react emotionally. I don't know what the evidence is. And I'm sure that the way you have been talking about it, it may be strong. I don't know the fact that I have children would affect that. I imagine it would affect anyone.

MR. HUMPHREYS: The reason I ask the question is, as I indicated this morning, I think you are the best person to know your own mind. And there is nothing wrong with an emotional reaction provided that the emotional reaction doesn't override your ability to be fair and impartial as you sit here now. Do you think there is a probability of that happening?

JUROR SEAT NO. 7: No, I don't.

MR. HUMPHREYS: All right. Thank you, Mr. Lake. I'll pass for cause.

THE COURT: All right. It's the defendant's peremptory.

MR. HUMPHREYS: We'll thank and excuse Mr. Lake.

THE COURT: All right, Mr. Lake, thank you for coming.

THE CLERK: Nicole Lucenty.

THE COURT: Good afternoon.

JUROR SEAT NO. 7: Hi.

THE COURT: You have heard a lot of questions. You have sat through all of this. First question I'll ask you is do you know of any reason at this point why you couldn't be fair and impartial?

JUROR SEAT NO. 7: (Nods negatively).

THE COURT: And you know from hearing the questions and the answers could you think of anything that might affect your qualifications that we ought to know about that you haven't stated in the questionnaires up to this point?

JUROR SEAT NO. 7: (Nods negatively).

THE COURT: Do you know any of the attorneys?

JUROR SEAT NO. 7: I have no idea who they are.

THE COURT: You have never met, seen the defendant before?

JUROR SEAT NO. 7: No.

THE COURT: And you have heard the charge is murder. And murder of a child. Does that create such an unusual set of feelings in your mind that you feel you could not fairly and impartially listen to what could be very graphic evidence?

JUROR SEAT NO. 7: Well, I work with children, so I have seen a lot of weird things. So I mean I don't think I would have a bias though.

THE COURT: You have never seen one of them dead, I assume?

JUROR SEAT NO. 7: No.

THE COURT: That's pretty rare that somebody sees that.

JUROR SEAT NO. 7: Yeah.

THE COURT: Do you think that the fact that you're going to see those kinds of photographs and hear people

talk about that sort of thing based on the amount of time you spend working with kids would essentially cloud your mind to the point where you couldn't be remain open minded and unbiased?

JUROR SEAT NO. 7: No, I think anybody would be, you know, bothered by a photographic photo, but I think I could be unbiased.

THE COURT: The idea is we don't want people that are going to say, well, he's guilty because these pictures are so horrible. Who would do a thing like this. We want you to listen to all of the evidence and make the judgment after you have heard all the facts. Do you feel you can do that?

JUROR SEAT NO. 7: Yeah.

THE COURT: All right, Mr. Wolfson.

MR. WOLFSON: Ms. Lucenty, am I pronouncing it right?

JUROR SEAT NO. 7: Yeah. It's Lucente.

MR. WOLFSON: In answer to question 78, actually in answer to question 79, you indicated you have a matter that you would like to discuss privately.

JUROR SEAT NO. 7: It's been resolved. So there is not a problem.

MR. WOLFSON: What about 78? You answered that you might have some conflicts with your class schedule.

JUROR SEAT NO. 7: That's what has been resolved.

MR. WOLFSON: In answer to question 74 which was the question regarding proof in a criminal case which is beyond a reasonable doubt, you seemed to indicate that because it's a murder case you might hold the people to a higher standard.

JUROR SEAT NO. 7: I'm sorry, can you refresh my memory? I'll not quite sure.

MR. WOLFSON: The question is the standard of proof in any criminal case is proof beyond a reasonable doubt is the same for a murder case as it is for a simple trespass or any other charged crime. Occasionally some

jurors will believe the standard in a murder case should be higher because the consequences of a conviction may be serious. As I have said, however, the standard is no higher than in any other criminal case. Do you think it should be? You answered yes. And you said I realize a crime is a crime, but murder is different from trespassing.

JUROR SEAT NO. 7: Well, I think it's a different thing. I mean killing or walking on somebody's property is a different situation. That's what I mean. It's a different situation.

MR. WOLFSON: What we're trying to find out is if you're going to require the People to prove the case to a higher standard than is the legal standard which is proof beyond a reasonable doubt and also goes on to say to a moral certainty. But that doesn't mean all possible doubt.

JUROR SEAT NO. 7: Okay.

MR. WOLFSON: We use the word reasonable.

JUROR SEAT NO. 7: Okay.

MR. WOLFSON: And you're indicating that possibly you might.

JUROR SEAT NO. 7: Okay. Some of the questions were kind of confusing. And I tried to answer it my best. So I just didn't understand it.

MR. WOLFSON: So as far as the proof concerned.

JUROR SEAT NO. 7: I would listen to both sides and decide upon that.

MR. WOLFSON: Well, we understand. But this is a little bit different issue. This is the issue of whether you wouldn't make the People prove something more than what's required by law which is simply beyond a reasonable doubt. And even though they're different types of cases, the proof that's required is the same.

JUROR SEAT NO. 7: Okay, yeah. Now I understand.

MR. WOLFSON: And do you think you can follow that instruction?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: You also mention that you think you might have a problem reaching a decision or a verdict.

JUROR SEAT NO. 7: I did?

MR. WOLFSON: You indicate that I believe you would have to be very confident in yourself to make the decision of guilty, not guilty or put somebody to death for a crime. I feel I could look at both sides to make a competent honest decision which is very well put. But, first of all, this is not a death penalty case. And I think we have talked about that.

JUROR SEAT NO. 7: I had gotten permission to get to go to my math class yesterday to get permission to be here. And maybe I missed that part when you explained it. I'm sorry. I didn't know that.

MR. WOLFSON: But there is some people that just don't feel they can reach a decision. Because whatever decision they made in whatever type of case it is it does affect other people's lives. Do you think you can?

JUROR SEAT NO. 7: Uh-huh.

MR. WOLFSON: All right, thank you. I'll pass the juror for cause.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Ms. Lucente, I want to thank you for writing as much as you did on your questionnaire. It really cuts down on the number of questions we have to ask. From where you were sitting in the courtroom this morning could you hear the subject matters I went over with other members of the panel?

JUROR SEAT NO. 7: Sometimes it got a little long. I kind of got lost in it sometimes, but I did hear you.

MR. HUMPHREYS: As a lawyer would say. So it was long, what's your point?

THE COURT: I was about to say that.

MR. HUMPHREYS: Were there any areas that you can think of right now that cause some concerns in your mind?

JUROR SEAT NO. 7: Well, at first I was confused about what you consider legally insane and medically insane, but I think the judge explained that really well.

MR. HUMPHREYS: Yeah. Insane is more or less a legal standpoint or a legal term anyway.

JUROR SEAT NO. 7: Mentally ill. The terms.

MR. HUMPHREYS: I don't know if doctors use the term insane. But before Sigmund Freud came along, there was already a recognized definition of not guilty because of insanity. It kind of predates modern psychiatry. The judge's explanation helped you?

JUROR SEAT NO. 7: Very much.

MR. HUMPHREYS: You understand that the charges here are very serious obviously. To that extent it's not like a trespassing case where someone is charged with walking across someone's property. From your answer I gathered that you would probably be more conscientious of the deliberation because the charge is murder; correct? You would be more conscientious I suppose of the fact that a murder case is different from a trespassing case.

THE COURT: I think the problem a lot of people have with that question is the difference between the amount of proof and the standard of proof. In other words, the standard is the same, but you rarely have a situation where the amount of proof is greater in a trespass case than it is in a homicide. I think that's really been the problem with the question.

MR. HUMPHREYS: Most people who have answered that question in a way that raises concerns have told us that the charges are serious. To some extent that might have affected the way they answered this question feeling that the standard should be higher. The standard of proof beyond a reasonable doubt has been around for a long, long time. Do you have any problems accepting that standard as the standard that's going to be used in this case?

JUROR SEAT NO. 7: Not at all.

MR. HUMPHREYS: All right. If and when we get to the penalty phase, the burden is going to switch around to me.

THE COURT: You mean sanity phase.

MR. HUMPHREYS: Excuse me, sanity phase. The burden of proof is going to switch to me, but the burden is going to be -- burden of proof is going to be lesser. Do

you have any problem with the concept that it is my burden of proof to prove to you by a preponderance that Mr. Patterson meets the criteria for legal insanity?

JUROR SEAT NO. 7: I don't have a problem.

MR. HUMPHREYS: Do you have any problem with the idea that the law makes my burden of proof lesser than the burden of proof that Mr. Wolfson has?

JUROR SEAT NO. 7: (Nods negatively).

MR. HUMPHREYS: That's a no. She can't take down head shakes. I noted that you work with kids through your church in the nursery?

JUROR SEAT NO. 7: Uh-huh. And the elementary school.

MR. HUMPHREYS: And the elementary school. With that as your background working with kids, is there going to be any problem with this case that involves the homicide of a 10-year-old?

JUROR SEAT NO. 7: No.

MR. HUMPHREYS: All right. Thank you, Ms. Lucente. Pass for cause, Your Honor.

THE COURT: All right. I believe it's now the People's peremptory.

MR. WOLFSON: Thank you, Your Honor. I'll thank and excuse Ms. Lucente.

THE CLERK: Michael Davis.

THE COURT: You heard the questions?

JUROR SEAT NO. 7: Yes.

THE COURT: Any that you think we ought to know about?

JUROR SEAT NO. 7: No, not at this time.

THE COURT: Okay. Nothing about your background or qualifications that you feel we should know other than what's in the questionnaires that they're going to ask you about?

JUROR SEAT NO. 7: No, everything is covered there.

THE COURT: All right, Mr. Wolfson.

MR. WOLFSON: Thank you, Your Honor.

Mr. Davis, question 37 dealt with circumstantial evidence.

JUROR SEAT NO. 7: Right.

MR. WOLFSON: And I know you answered the questionnaire before we have gone into the issues that we have been discussing for the last day and-a-half. You had some concerns about circumstantial evidence when you answered the questionnaire. You want me to read your answer?

JUROR SEAT NO. 7: No, I was kind of confused. Through listening to all of this, it's cleared it up.

MR. WOLFSON: You're willing to look at the basis of any opinions in terms of the validity of the and the basis of the psychiatric opinion before you accept an opinion?

JUROR SEAT NO. 7: I don't quite understand it.

MR. WOLFSON: Okay. Very likely we're going to hear from at least one psychiatrist if you're chosen as a juror during this trial, possibly as many as four. The psychiatrists were not at the scene, did not see the defendant when the crime occurred. So they have to use, as you will, what they have reviewed as evidence in order to form the opinion they may express in court. They will be asked I'm sure what they looked at, what they used for the basis of their opinion. You'll get the opportunity to judge what evidence was used for the basis of their opinion. Did they just simply listen to the defendant? Did they look at police reports and did they look at other records? And you will basically get to form your own feelings or opinion on whether or not their opinion is valid. Would you be able to look at what was underlying their opinion?

JUROR SEAT NO. 7: Uh-huh, yeah.

MR. WOLFSON: Versus just accepting it because they.

JUROR SEAT NO. 7: Yeah, look at the whole picture.

MR. WOLFSON: Look at the whole picture. The offense itself what we have talked about it doesn't appear

we are going to be dealing with. And, in fact, we're going to be dealing with some unpleasant events. And knowing that the defendant is charged with the murder of a child, do you have a bias against him to the extent you don't think you could be fair and impartial as you sit here?

JUROR SEAT NO. 7: No, not at this time.

MR. WOLFSON: And if you have to have some feelings about the whole situation, if you find later on that there is some circumstances -- and this is hypothetical -- that in your mind generate some sympathy for the defendant, are you going to let that affect how you judge the facts and the law and follow the law in the case as you deliberate?

JUROR SEAT NO. 7: No.

MR. WOLFSON: I'll pass Mr. Davis for cause.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Thank you. Mr. Davis, you work part-time as a correctional officer at the Wayne Brown Correctional Facility?

JUROR SEAT NO. 7: That's correct.

MR. HUMPHREYS: Are you a floor officer?

JUROR SEAT NO. 7: Floor officer, yes.

MR. HUMPHREYS: Okay. How long have you worked at the jail?

JUROR SEAT NO. 7: Since I believe July.

MR. HUMPHREYS: July of '93?

JUROR SEAT NO. 7: Later part of July this year, yeah.

MR. HUMPHREYS: Do you normally work one particular shift or do you work variety?

JUROR SEAT NO. 7: I'm just a part-time on call whenever they need me call in.

MR. HUMPHREYS: Are you familiar with Mr. Patterson from your work at the jail?

JUROR SEAT NO. 7: Yes, I have seen him.

MR. HUMPHREYS: Is there anything about your work at the jail and having heard of Mr. Patterson from your work at the jail that you feel is going to make it

difficult for you to be fair and impartial to both sides in this case?

JUROR SEAT NO. 7: No, not at this time. Like I can separate what we have talked about at the jail and stuff.

MR. HUMPHREYS: Okay, thank you. Pass for cause.

THE COURT: All right. It's the defendant's peremptory.

MR. HUMPHREYS: We'll thank and excuse Mr. Davis.

THE COURT: Mr. Davis, thank you for coming.

THE CLERK: Stephen Van Valkenburg.

THE COURT: Good afternoon.

JUROR SEAT NO. 7: Good afternoon.

THE COURT: You have heard a lot of questions, some of them many times over. Obviously there's been a lot of description hopefully that's enlightened people concerning the questions and the questionnaire now. With all of that in mind, is there anything you think we ought to know about at this point that would affect your ability to judge this case?

JUROR SEAT NO. 7: On the questionnaire it said it asked me if I would could keep an open mind, and I thought that that was an outrageous question to ask if I could keep an open mind about. To take your own child's life, a person would not necessarily have to be insane. But to commit the act as has been described here, I believe one would.

THE COURT: Okay. Do you feel that you could obviously what -- when the term open mind is used, the term refers to a willingness not to allow preconceived notions to filter in and take the place of evidence. The purpose of a jury trial is to present evidence and have a group of people decide the convincing force of that evidence whether it proves what the law requires to be proved. If all of the jurors in the jury box have a preconceived idea of what a person's state of mind is or what type of person would have to commit this type of an

offense and allowed that to take the place of evidence, then the process wouldn't work. Do you understand that?

JUROR SEAT NO. 7: Yes, I do.

THE COURT: All right. I'll going to give you an example. I don't know if you recall about it, but do you recall or have you ever read about the murder of Sharon Tate in Los Angeles many years ago?

JUROR SEAT NO. 7: I've heard.

THE COURT: You have heard Charles Manson?

JUROR SEAT NO. 7: Yes.

THE COURT: For a long time before Mr. Manson was caught the circumstances surrounding that crime were extremely bizarre. And it was reported in the media as extremely bizarre. Even after Mr. Manson was caught and his explanation for what happened had something to do with essentially a revolutionary intent in terms of killing off certain people and changing the order of society. Now the question I'm asking you is people just hearing those facts might have formed immediate conclusions about his motives, about his state of mind, the sanity, his presence or absence of sanity. But what I'm saying is you can hear a certain series of facts that cause you to have a certain frame of mind or opinion. But in the jury room you're asked or in this trial you're asked to put those ideas out of your head and look at the case not as you would if you were reading it a newspaper but as you would see it after hearing all of the evidence. Do you understand that? Do you think could you do that?

JUROR SEAT NO. 7: To decide it only on the basis of the evidence provided in court?

THE COURT: Right.

JUROR SEAT NO. 7: Yes, I think I could.

THE COURT: In other words, everyone here agrees that it's a rather bizarre thing to kill any human being. Certainly for a parent to kill a child is usually even more bizarre. But the question is would you automatically assume from that without having heard any evidence that have you made your mind up, in other words, concerning Mr. Patterson's sanity or lack of sanity? Do you feel you

have made your mind up to the point where it wouldn't matter what the evidence was, your mind is fixed?

JUROR SEAT NO. 7: No, my mind is not fixed. However, I don't think the sanity -- I think that a person has to take responsibility for their actions whether sane or insane.

THE COURT: Okay. Well, that raises a different question. And that's the question that often is debated even among psychiatrists and penalogists about that question. Here do you feel that even though you might believe that it was Mr. Patterson's responsibility to take responsibility for that act, could you nonetheless find him insane if the legal test -- if he persuaded you that he was insane pursuant to that legal test? Or are you saying that you would find him sane just to make sure that there was some accountability as you saw it for his conduct? Do you understand the question?

JUROR SEAT NO. 7: I think that he had to have been insane to have done what he did. I don't think I understand your question.

THE COURT: All right. So you can't think of any possible way that someone could do what you have heard so far in this proceeding and not be insane?

JUROR SEAT NO. 7: No, I don't think so.

THE COURT: And do you think that so is there any kind of evidence that could be presented do you think that would persuade you otherwise? In other words, if you know that someone has killed their child and you know that the way in which they did it was essentially to pass the child into the path of a semi truck on a freeway, would you automatically conclude that from those facts and those facts alone and no matter who the defendant was or who the child was or where it happened, that that person had to be legally insane under the test you heard me read?

JUROR SEAT NO. 7: Yes.

THE COURT: All right. Mr. Wolfson, any questions you wish to ask?

MR. WOLFSON: Well, I can just ask this question now. If you were asked to vote right now on the issue of Mr. Patterson's sanity -- insane, sane -- how would you vote at that time?

JUROR SEAT NO. 7: Insane.

MR. WOLFSON: Pass -- excuse for cause, Your Honor.

THE COURT: Mr. Humphreys, any questions?

MR. HUMPHREYS: Let me ask you this question. Do you have any preconceived notions at the present time as to whether Mr. Patterson is guilty or not guilty of murder? You can answer that yes or no without giving which direction you may be heading.

JUROR SEAT NO. 7: Would you please ask it again?

MR. HUMPHREYS: Sure. Do you have any preconceived notions at this time, keeping in mind that you haven't heard any evidence, as to whether Mr. Patterson is guilty or not guilty of murder?

JUROR SEAT NO. 7: No.

MR. HUMPHREYS: It's, as I understand it, the problem you have is with the sanity issue. It's your feeling that any parent who would do this to their own child must be insane?

JUROR SEAT NO. 7: Yes.

MR. HUMPHREYS: Are you using the term insane in the legal sense that the judge gave you or in shall I say a layman's definition being a synonym for crazy.

THE COURT: Or both.

MR. HUMPHREYS: Or both.

JUROR SEAT NO. 7: They seem to be both. It's kind of a seem kind of a gray kind of area.

MR. HUMPHREYS: That's an understatement. It's been a gray area of the law for over 200 years now. Let me try this. You understand that somebody -- well, there are some people who say anybody who would kill another human being has to be mentally ill. Would you agree with that as a general proposition?

JUROR SEAT NO. 7: No.

MR. HUMPHREYS: Not a war, it's not self-defense. You wouldn't agree with that, okay.

JUROR SEAT NO. 7: No.

MR. HUMPHREYS: So it's not the fact that someone is killed. It's the 10-year-old daughter of my client. That's the factor that causes you concern.

JUROR SEAT NO. 7: Yes.

MR. HUMPHREYS: All right. And I think you indicated that it wouldn't really matter what evidence was presented here. That's your view and it would be very difficult for you to change that view.

JUROR SEAT NO. 7: Yes.

MR. HUMPHREYS: All right. No further questions, Your Honor.

THE COURT: All right. Mr. Van Valkenburg, you're excused. Thank you very much for your candor.

THE CLERK: J.D. Hurley.

THE COURT: Mr. Hurley, good afternoon.

JUROR SEAT NO. 7: Yes, sir. Afternoon.

THE COURT: Heard all the questions and answers?

JUROR SEAT NO. 7: Three or four times.

THE COURT: Probably more than that. Well, the first question I have to ask you is is your mind made up with respect to any of the issues in this case as Mr. Van Valkenburg candidly stated his. Do you feel that you're --

JUROR SEAT NO. 7: No, my mind is not made up till I hear the evidence.

THE COURT: Okay. And can you conceive of situations where someone might kill their own child and be sane and others where they might not be?

JUROR SEAT NO. 7: That's right.

THE COURT: And at this point you don't know one way or the other?

JUROR SEAT NO. 7: That's right.

THE COURT: All right, Mr. Wolfson.

MR. WOLFSON: How are you today?

JUROR SEAT NO. 7: How are you?

MR. WOLFSON: Are you able to hear us all all right?

JUROR SEAT NO. 7: I can hear you now.

MR. WOLFSON: What?

JUROR SEAT NO. 7: I can hear you now. I couldn't hear you as long as I was behind you there.

MR. WOLFSON: In answer to question 37 which dealt with circumstantial evidence, you seem to have some concerns when you filled out the questionnaire. You indicated that you don't believe in it, and you indicated that you felt that circumstantial evidence might convict the not guilty. In our discussion of the subject we have gone over and over, have you had any --

JUROR SEAT NO. 7: Well, in answer to that question I feel pretty strong that a client is innocent till proved guilty. And I'm willing to go along -- I think my mind is relative enough to go either direction. If I feel that he's guilty, I'll go that way. If he's proven innocent, I'm willing to go that way.

MR. WOLFSON: A person is presumed not guilty until proven guilty. That is the law. We wouldn't ask you to take an approach that's different. But when we ask questions about circumstantial evidence, we're talking about types of evidence that may be admitted. And circumstantial evidence and direct evidence under the law both carry the same weight. And you did indicate that you would have a problem with circumstantial evidence. Do you think after hearing the definition and the discussion we have had you still have that problem?

JUROR SEAT NO. 7: I don't think so.

MR. WOLFSON: You understand the differences and the fact that in order to -- and let me back up a minute. We have all agreed that this isn't a who done it. And it isn't a how it was done. That you know that's not in dispute. There were people who saw the child carried into the truck. And in fact so that's not the problem. But it's what was in mind of the defendant when the killing was done. And except for listening to the defendant and judging what he said what the veracity and the truthfulness

of what he said as an example of his intent, we don't have a way of opening up his mind and looking into it except by circumstantial evidence. The facts that lead us to infer other facts.

JUROR SEAT NO. 7: I guess what led me to that belief I have known cases where a person has been convicted on circumstantial evidence. And then later after he served quite a bit of time in prison, he was found innocent.

MR. WOLFSON: I understand. Does that concern you to the extent that you feel you can't give circumstantial evidence the same weight as direct evidence?

JUROR SEAT NO. 7: (Nods affirmatively).

MR. WOLFSON: You do have to answer audibly.

JUROR SEAT NO. 7: Yeah.

MR. WOLFSON: It does. So because of those concerns, you don't think you can follow the instructions of the court and give circumstantial evidence the same weight?

JUROR SEAT NO. 7: No, I don't think so.

MR. WOLFSON: Okay, thank you.

MR. HUMPHREYS: No questions.

THE COURT: All right.

MR. WOLFSON: I believe that for cause.

THE COURT: All right. Mr. Hurley, thank you. You're excused.

THE CLERK: Eugene Whittaker.

THE COURT: Good afternoon.

JUROR SEAT NO. 7: Good afternoon.

THE COURT: You have heard all the questions?

JUROR SEAT NO. 7: Uh-huh.

THE COURT: Heard the answers?

JUROR SEAT NO. 7: Yes.

THE COURT: Got any questions?

JUROR SEAT NO. 7: No. You probably like to know one piece in my background.

THE COURT: Very well.

JUROR SEAT NO. 7: My brother's daughter was killed by her husband. And then he committed suicide taking himself and their baby. I don't know if that has a bearing on it or not.

THE COURT: Well, that's up to the attorneys. That doesn't automatically disqualify you. The question that has to be asked is how you feel that that would affect your ability to listen to evidence in the case where it's alleged that a child was killed and then decide questions about the defendant's mental capacity and what was going on in his head essentially.

JUROR SEAT NO. 7: I don't think it would influence that.

THE COURT: All right, Mr. Wolfson. In that case obviously there never was a trial.

JUROR SEAT NO. 7: No, there wasn't.

THE COURT: So you have never had an occasion to be a witness in a trial.

JUROR SEAT NO. 7: No.

THE COURT: Or to testify or to evaluate evidence concerning a homicide before personally.

JUROR SEAT NO. 7: No, I haven't.

THE COURT: All right. Mr. Wolfson.

MR. WOLFSON: Mr. Whittaker, you're retired from the Grass Valley Group?

JUROR SEAT NO. 7: That's correct.

MR. WOLFSON: And your occupation was an engineer?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: Did you hear my other question to Mr. Lake?

JUROR SEAT NO. 7: I don't know why an engineer should be different in evaluating information fairly.

MR. WOLFSON: I appreciate that. Perhaps we as lawyers think engineers are different because engineers make their living evaluating information, analyzing it. And some engineers have probably undeserved reputation for picking things apart. But you're correct. There is no reason. Do you feel that if as you listen to the

psychiatrists' testimony if there is psychiatrists' testimony that you will look at the basis to why their opinion, the facts?

JUROR SEAT NO. 7: Absolutely.

MR. WOLFSON: See if there is a valid basis. In fact in measuring one against the other. If one basis for one opinion seems more solid and that foundation is more solid than another, you'll take that into account again?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: I guess I didn't mention what you just told us in here. If you did, I missed it.

JUROR SEAT NO. 7: What's that?

MR. WOLFSON: The fact you said that somebody had been the victim of a --

JUROR SEAT NO. 7: It was a niece. Yeah, it was victim of her husband.

MR. WOLFSON: I didn't see it here.

JUROR SEAT NO. 7: I didn't know that it applied. The question wasn't asked for that. I put in the things where I had sat on two juries before.

MR. WOLFSON: That's fine. Just glad we know. Despite that, you feel you can be fair and impartial?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: And I'm going to ask a question about that or about that circumstance that may not -- the answer may be very obvious. But if a person carries out a murder attempted suicide, but isn't successful in attempt, would that in some way have you look at the facts any different than if it were just a murder without the suicide attempt connection?

JUROR SEAT NO. 7: Let me ask you by setting the situation I was aware of. That because I think it will be meaningful to you. I knew of a man who took his wife's life and then committed suicide. This was a different situation about 30 years ago. And his back had been crushed, for example, in a cave in X. So I don't know how you could judge him because his wife wasn't judging him. I knew his wife before. And she didn't find fault with the fact that after that cave-in he mistreated her. So

I felt that how could I judge him? I'm just giving you a feeling for there are circumstances where we don't know.

MR. WOLFSON: But you're talking about a successful attempt at killing oneself.

JUROR SEAT NO. 7: Well, he actually did it, yeah.

MR. WOLFSON: But in attempting to kill oneself and killing somebody else just before that, that doesn't lessen the liability or.

JUROR SEAT NO. 7: I just believe there can be circumstances which we don't understand which may modify a verdict. That's what I mean.

MR. WOLFSON: But would you -- do you still believe you could follow the law?

JUROR SEAT NO. 7: Yes, I do.

MR. WOLFSON: And if you're looking at following instructions which say if certain act occurs and that act is committed with certain intent, for example, intent to kill and there is the required other intent or actions beforehand or thoughts, the fact that the person might have intend also to kill himself in addition, would you let that affect your.

JUROR SEAT NO. 7: No, I think I would want to judge it on the actual facts that is presented.

MR. WOLFSON: Can you separate mental illness from the legal definition of insanity?

JUROR SEAT NO. 7: I think I can. It's just explained to me so I understand what the difference is.

MR. WOLFSON: You don't want to us do it again, do you?

JUROR SEAT NO. 7: I don't know that we have explained that in here yet by anybody.

MR. WOLFSON: Legal definition of insanity?

JUROR SEAT NO. 7: I understand there is a legal definition. I don't know what that legal definition is. That's all I'm saying.

MR. WOLFSON: Your Honor.

THE COURT: If I can find it again.

MR. HUMPHREYS: Judge, can we approach the bench while you're looking?

THE COURT: Yes.

Mr. Whittaker, what I will say is that under the law not everyone who is suffering from a diagnosed mental disorder or illness or abnormality is legally insane. And we'll have to wait till we hear all the evidence because I won't know what exact definition of legal insanity I'm going to give until I know what the evidence is. But I will say that you can assume that not every person who has a mental illness or abnormality is legally insane. Obviously, sane people, insane people generally have mental illness abnormal, but converse isn't always true. And that's what you are here to decide or one of the issues you may be here to decide. I don't know if there is anyone to testify Mr. Patterson even has a mental illness. I don't know that. But if they do, what counsel is trying to get from you is a commitment that you won't automatically assume as one of the earlier persons seated in that seat did that he was insane simply because there is evidence of abnormality or simply from the fact that he killed his child.

JUROR SEAT NO. 7: I wouldn't do that, no.

MR. WOLFSON: And to go on and ask you the question I have asked some other potential jurors. If for whatever reason during the portion of the trial some sympathy is generated in your mind for Mr. -- for the defendant, can you set aside that sympathy and judge the case on the facts and the law?

JUROR SEAT NO. 7: Yes, I can because I did that in a previous case where the sympathy was very heavily toward one person. And when we got in the jury deliberation room, the evidence that we actually had to look over and go over actually made it the other way. And so I had to go along.

MR. WOLFSON: And I'd also ask you in case the biased against Mr. Patterson.

JUROR SEAT NO. 7: I'll not one way or the other. I'm not one way or the other.

MR. WOLFSON: If you hear something and become very sympathetic toward or I should say biased against the

defendant, do you think you can set that aside and again judge the case on the facts?

JUROR SEAT NO. 7: Yes, I do.

MR. WOLFSON: All right, thank you. I'll pass for cause.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Thank you. Mr. Whittaker, how are you this afternoon?

JUROR SEAT NO. 7: Fine, thank you.

MR. HUMPHREYS: How long ago was the incident that you were telling us about? How long ago did that happen?

JUROR SEAT NO. 7: Probably four, four or five years ago, something like the order -- for my niece?

MR. HUMPHREYS: Yes.

JUROR SEAT NO. 7: Yes.

MR. HUMPHREYS: And you don't think that's going to be a problem?

JUROR SEAT NO. 7: I don't think so.

MR. HUMPHREYS: All right. From where you were sitting in the court this morning, were you able to hear the subject matters that I went over with the other members of the panel?

JUROR SEAT NO. 7: Yes, I was.

MR. HUMPHREYS: Did any of the areas I talked about raise concerns in your mind or would have been areas you would have answered differently?

JUROR SEAT NO. 7: No.

MR. HUMPHREYS: All right. Thank you, sir. That's all I have. Thank you. Pass for cause.

THE COURT: I believe it's the People's peremptory.

MR. WOLFSON: I'll thank and excuse Mr. Ford.

THE COURT: Mr. Ford. Thank you.

All right. We're going to take the afternoon break at this time. See you back here in about ten minutes.

THE COURT: All right. Madam Clerk, would you call the next prospective juror, please. The record will reflect the defendant is present with counsel.

THE CLERK: B. Sharon Wulff.

THE COURT: Good afternoon.

JUROR SEAT NO. 1: Hello.

THE COURT: You have undoubtedly heard a lot of questions. Not that you have a clear picture of what's been happening. But based on what you have heard, do you have any questions or any comments concerning your qualifications that we should know about at this point?

JUROR SEAT NO. 1: No, I don't.

THE COURT: All right. Do you have any preconceived ideas as you sit there today that you feel would color your judgment of the facts in this case?

JUROR SEAT NO. 1: No.

THE COURT: We're not asking you to keep your common sense outside, obviously. But, in other words, some of the jurors or prospective jurors have said they already formed opinions about various aspects of this case even though they haven't heard the evidence. And some people do that. And can't afford it. Do you feel that you're in that situation at all right now?

JUROR SEAT NO. 1: No.

THE COURT: All right. Mr. Wolfson.

MR. WOLFSON: Thank you, Your Honor. How are you today?

JUROR SEAT NO. 1: Fine, thank you.

MR. WOLFSON: You're going to hear some of the same questions you have heard before. Did you have any trouble hearing them when we were.

JUROR SEAT NO. 1: No, I didn't.

MR. WOLFSON: With the prospect of panel members. In your case you did answer one of the circumstantial evidence questions with some concern. Do you recall?

JUROR SEAT NO. 1: No.

MR. WOLFSON: Let me read you the question. Would you reject circumstantial evidence as a means of providing specific intent or mental state. And you did say no, but you said more information was needed to answer this with conviction. You have heard us talk about

circumstantial evidence. And you heard us discuss the problem that it's almost impossible to open up somebody's mind and look into it. Would you still answer that question the same way after the discussions you have heard?

JUROR SEAT NO. 1: No. I don't see a problem with it now.

MR. WOLFSON: And in question 57 dealing with whether or not a person who kills his own child must necessarily be mentally ill, you answered yes. And my concern would be do you still feel that way?

JUROR SEAT NO. 1: I think with evidence I'm open minded for that. I don't -- it's not black or white.

MR. WOLFSON: But at the same time can you follow the law as it applies to the legal definition of insanity, the M'Naghten rule. And you recognize there is a difference between mentally -- being mentally ill and legally insane?

JUROR SEAT NO. 1: Uh-huh.

MR. WOLFSON: Yes.

JUROR SEAT NO. 1: I can see that there is a difference there.

MR. WOLFSON: Do you think there would still be some carry over from your feeling that a person has to be mentally ill before they can commit an act such as killing a child?

JUROR SEAT NO. 1: No, I think my problem actually with that question is I was thinking about myself. And I cannot conceive myself.

MR. WOLFSON: I'll pass for cause. Thank you.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Mrs. Wulff, would you be offended if I didn't ask you any questions?

JUROR SEAT NO. 1: Oh, no, I wouldn't.

MR. HUMPHREYS: I didn't think so. Pass for cause.

THE COURT: All right. It's now the defendant's peremptory, I believe.

MR. HUMPHREYS: Yes. We'll thank and excuse Juror No. 7, Mr. Whittaker.

THE COURT: Mr. Whittaker.

THE CLERK: Carla Racliff.

MR. HUMPHREYS: Can we approach the bench, Your Honor?

THE COURT: All right.

(Discussion off the record)

THE COURT: The attorneys have indicated they would like to question you in chambers. So I guess we'll have to take everybody in for chambers.

(In chambers)

THE COURT: All right. The record will reflect we're now outside the presence of the other prospective jurors with Ms. Racliff. Mr. Humphreys and Mr. Wolfson, you indicated in the questionnaires that there were a number of issues that Ms. Racliff had asked to mark or discuss privately. So they're honoring your request as it were. I don't know what the areas are, so I can't very well ask you about them unless you want to just volunteer for me what the concerns are.

JUROR: I'd be happy to in here. I was a witness to a armed burglary and attempted murder. Not that you know I can probably separate the two. But I didn't want to discuss it in front of everyone out there.

THE COURT: Surely. How long ago was this?

JUROR: It was July of '91.

THE COURT: And did it occur in this county?

JUROR: No. San Diego County.

THE COURT: San Diego County. Was anyone physically injured as a result of what you witnessed?

JUROR: Yes. My boyfriend at the time was injured. And it did.

THE COURT: Was this in your own residence?

JUROR: No, it was his residence.

THE COURT: His residence.

JUROR: And it did -- the person that came in doing the burglary and attempted murder turned out to be a law enforcement officer.

THE COURT: Oh, really. Okay.

JUROR: And there was a lawsuit pending of which I am not a part of. My husband is.

THE COURT: He's now your husband?

JUROR: He is now my husband.

THE COURT: All right. I take it this particular officer was an officer in San Diego County or somewhere in Southern California?

JUROR: Correct.

THE COURT: Is there anything about that experience, the fact that I assume it was off duty. Was he off duty or on duty at the time?

JUROR: He was an undercover officer and that's being decided whether he was on or off duty.

THE COURT: Oh, I see, okay. Anything about that that would cause you at this point to automatically reject the testimony of some other police officer just because of that one experience?

JUROR: No.

THE COURT: All right. Is there anything about being an eye witness to this event that would cause you to have any fixed opinions about Mr. Patterson's motivation for whatever the evidence shows he might have done?

JUROR: No.

THE COURT: In other words, you wouldn't feel any prejudice against him at this point or sympathy for him at this point?

JUROR: Can I say something?

THE COURT: Sure.

JUROR: Part of the reason that I moved from San Diego up to this area was to separate what happened there, and then that was then.

THE COURT: Okay. Would this at all cause you to -- would sitting as a juror in this case have any effect on your ability to continue this process of separation?

JUROR: No, I don't think so.

THE COURT: So, basically, the reason you wanted to come in here was not because you have any fixed opinions that you didn't want them to hear. It's just that

you didn't want to go into this personal event in your life in the presence of all.

JUROR: Right. I moved up here for my privacy.

THE COURT: All right. Mr. Wolfson, do you have any questions limited to the areas that she wanted to discuss in privacy because I think the rest of the areas we can cover out in front of other jurors.

MR. WOLFSON: Was the case prosecuted in San Diego County?

THE COURT: You mean criminally?

MR. WOLFSON: Criminally.

JUROR: You know, I put on my questionnaire that the lawyer I put on there was a criminal lawyer representing my husband. Actually, he's a civil lawyer. It's a civil suit.

MR. WOLFSON: But was the case prosecuted by the district attorney's office down there?

THE COURT: Was this undercover officer ever criminally prosecuted or do you know?

JUROR: Well, he's dead. He was shot in the house.

THE COURT: Oh, that's a fact I guess we needed to know.

JUROR: I'm sorry, you know. I don't like to talk about it much.

THE COURT: Right, I can understand. Okay. So there is no criminal case obviously.

JUROR: Right.

THE COURT: That answers that question.

MR. WOLFSON: I can make some assumptions. Was he shot by your husband?

JUROR: No. I might as well tell you. I managed to escape from the house. He didn't know I was in the house. And I ran to the neighborhood and called 9-1-1. The police came. Officer came in the back door and witnessed him torturing my boyfriend. He had him hog tied and was threatening to kill him. And ordered him to stop and freeze and he didn't. So he was shot him three times and he was killed. Then.

THE COURT: Were you present when the shooting actually occurred?

JUROR: No. I was outside the residence. Then it was discovered that he was a law enforcement officer also.

THE COURT: All right. Mr. Humphreys, anything you wish to discuss about the private nature of her.

MR. HUMPHREYS: It may be covered, but question 34 you had answered yes to the questions has anyone you know ever been arrested or charged, in prison or jail or subject of an investigation. Is this the same incident or.

JUROR: No, this is a separate incident, but it also leads into the -- you want me to explain that one?

MR. HUMPHREYS: If you could, please.

JUROR: Okay. My husband before I was dating him was dating another girl. He got into problems with her. He was convicted for great bodily harm.

THE COURT: Assault with great bodily harm.

JUROR: Yes. He did eight months time. He involuntarily gave up his fourth waiver search.

THE COURT: Fourth amendment.

JUROR: Fourth amendment search thing. So the officer that robbed us ultimately came on a search May 30th I think it was right before the robbery. He came to the house, searched the residence, found a large sum of money on the property that was my boyfriend's grandmother's money. She comes from the depression era and doesn't believe in the banks.

THE COURT: Shoe box banks?

JUROR: Yeah. So he discovered the money and came back later basically to rob us, and that's where our lawsuit is sitting, you know, on that fourth waiver.

MR. HUMPHREYS: It was your boyfriend or your ex-husband who was convicted?

JUROR: My boyfriend.

THE COURT: Who is your current husband; correct?

JUROR: Correct.

MR. HUMPHREYS: Thank you. I have no further questions.

THE COURT: All right. We'll go back out then, and we'll steer clear of those issues. And you may take the appropriate seats.

(Open court)

THE COURT: All right. Mr. Wolfson, do you have any additional questions of Mrs. Racliff?

MR. WOLFSON: No additional questions.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Were you able to hear the questions I asked the other or the subject matters rather I went over with the other members of the panel that morning?

JUROR SEAT NO. 7: Yes, I was.

MR. HUMPHREYS: Did any of the areas that I covered with them raise any red flags in your mind?

JUROR SEAT NO. 7: No.

MR. HUMPHREYS: Thank you. Pass for cause.

THE COURT: All right. I believe it's the People's peremptory.

MR. WOLFSON: Yes, Your Honor. I'll thank and excuse Mrs. Racliff.

THE COURT: All right. Thank you for coming.

THE CLERK: Carmen Gardner.

THE COURT: Good afternoon.

JUROR SEAT NO. 7: Hi.

THE COURT: And you have heard a lot of questions.

JUROR SEAT NO. 7: Oh, yes.

THE COURT: Some of them the same time over and over. And I don't know what the answers to the questionnaires are, so I don't know if we're going to get more on the same subjects. But as you sit here right now, can you think of any reason why you couldn't be fair and impartial?

JUROR SEAT NO. 7: No, I can't.

THE COURT: Have you formed any opinion in your mind as to the outcome of how this case is going to be?

JUROR SEAT NO. 7: No, I haven't.

THE COURT: So you don't have any opinion as to Mr. Patterson as to whether he's sane or insane or whether he's guilty of murder or not guilty or guilty of something other than murder or any of those things?

JUROR SEAT NO. 7: No, I don't.

THE COURT: Do you feel that you would be able to evaluate the evidence and fairly try the case and give both sides an unbiased and fair decision?

JUROR SEAT NO. 7: Yes, I do.

THE COURT: All right. Do you know any of the attorneys?

JUROR SEAT NO. 7: No.

THE COURT: All right. Have you heard anything about this case before today?

JUROR SEAT NO. 7: No.

THE COURT: All right. Mr. Wolfson.

MR. WOLFSON: No questions, Your Honor.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: I'd also pass for cause.

THE COURT: All right. Then it's the defendant's peremptory.

MR. HUMPHREYS: Pass the challenge, Your Honor.

THE COURT: It's the People's.

MR. WOLFSON: I'll thank and excuse Ms. Gardner.

THE COURT: All right. Thank you for coming, ma'am.

THE CLERK: Karl Stewart.

THE COURT: Same questions to you.

JUROR SEAT NO. 7: Okay, I have one comment. Personally, if it snows during the trial, I could be snowed out from where I live.

THE COURT: Where do you live?

JUROR SEAT NO. 7: Three miles beyond Washington. They don't plow the road. Just warning you.

THE COURT: Okay. That's a possibility. As far as anything else, have you heard anything --

JUROR SEAT NO. 7: No.

THE COURT: -- that would cause you a problem in sitting as a juror?

JUROR SEAT NO. 7: No.

THE COURT: Do you feel that you can assess the evidence in this case fairly and impartially to both sides?

JUROR SEAT NO. 7: Yes.

THE COURT: And you feel that you'll follow the court's instructions when it comes to defining such terms as insanity and some of these other issues?

JUROR SEAT NO. 7: Yes.

THE COURT: All right. Mr. Wolfson.

MR. WOLFSON: If you hear evidence that there may be some mental disease or disability or defect and you believe there is, would you still follow the instruction that defines what it takes before a person can be considered legally insane?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: You heard the instruction?

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: Any problems with the instruction?

JUROR SEAT NO. 7: I think it would be difficult, but, yeah, I can follow it.

MR. WOLFSON: Difficult?

JUROR SEAT NO. 7: To determine some of the mental attitude, but I could follow the rules the judge says.

MR. WOLFSON: Keep in mind the instruction gives you parameters. And you're to apply the evidence. And His Honor will instruct you in the law. Do you agree there is a difference between legal insanity and mental defect or disease?

JUROR SEAT NO. 7: I have learned that.

MR. WOLFSON: Also, you heard both myself and counsel talk of the fact that after the guilt phase when you go into the sanity phase, the burden shifts to the defense.

JUROR SEAT NO. 7: I understand.

MR. WOLFSON: And they have to prove by a preponderance of the evidence their contention.

JUROR SEAT NO. 7: Yes.

MR. WOLFSON: I thank you. I have nothing further. Pass for cause too.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Mr. Stewart, did you hear the subject matters I discussed with the other jurors?

JUROR SEAT NO. 7: Yes.

MR. HUMPHREYS: Any red flags?

JUROR SEAT NO. 7: No.

MR. HUMPHREYS: All right. You had indicated in your questionnaire that one of your eyes the vision is not as good as it once was; correct?

JUROR SEAT NO. 7: I have a cataracts.

THE COURT: Mr. Humphreys, I can't see him.

MR. HUMPHREYS: I'm sorry, yeah. One of the jobs of jurors is to decide credibility of witnesses. Folks who sit up here. And you would receive an instruction that would tell you that among the things you're allowed to consider is a witness's demeanor on the stand, their attitude towards testimony. In other words, you can look at them. And I suppose if you saw a witness up here who was sweating bullets, you might be able to take something like that into consideration in assessing whether they were telling you the truth or not. Does the problem with your eye affect your ability to see things that are maybe ten feet away like from where you are to the witness stand?

JUROR SEAT NO. 7: I'm not sure I could see a bead of perspiration.

THE COURT: I'm not sure I could either.

MR. HUMPHREYS: I'm not sure I could either, but I use that as one example. But if somebody sitting up here you can see them clearly enough?

JUROR SEAT NO. 7: Surely.

MR. HUMPHREYS: Thank you, sir. Pass for cause.

THE COURT: All right. It's the defendant's peremptory.

MR. HUMPHREYS: Pass the challenge, Your Honor.

THE COURT: It's the People's peremptory.

MR. WOLFSON: I'll thank and excuse Mr. Beilby.

THE COURT: Mr. Beilby, thank you for coming.

JUROR SEAT NO. 2: You bet.

THE CLERK: Evelyn Martin.

THE COURT: Good afternoon, Mrs. Martin.

JUROR SEAT NO. 2: Hello.

THE COURT: You have heard a lot of questions and a lot of different comments from people. I guess you probably figured out what the first question to you will be. Do you know of any reason why you couldn't be fair and impartial in this case to both sides?

JUROR SEAT NO. 2: No, I don't.

THE COURT: All right. And from what you have heard, do you know of anything in your background that would affect your qualifications that we ought to know about that you have not put down in the questionnaire -- that you can think of?

JUROR SEAT NO. 2: Nothing.

THE COURT: All right. Have you heard of this case before today that you can recall?

JUROR SEAT NO. 2: No, I haven't.

THE COURT: All right. Have you formed any impressions or opinions in your own mind about the likely guilt or innocence or sanity or insanity of Mr. Patterson at this point having heard no evidence?

JUROR SEAT NO. 2: No, I haven't.

THE COURT: All right. Mr. Wolfson.

MR. WOLFSON: Mrs. Martin, my voice sometimes drops. Can you hear me all right?

JUROR SEAT NO. 2: I can hear you, uh-huh.

MR. WOLFSON: And you did leave one question blank regard to circumstantial evidence, number 37. Is there any reason you would refuse to consider circumstantial evidence as a means of proving the facts in this case? Judging from your other answers regarding circumstantial evidence was that inadvertent?

JUROR SEAT NO. 2: I didn't understand it.

MR. WOLFSON: Do you understand it now a little bit better since we have been talking about circumstantial evidence?

JUROR SEAT NO. 2: Yes, I do.

MR. WOLFSON: And would you -- do you know how you would answer that? Is there any reason you would refuse to consider circumstantial evidence as a means of proving the facts in this case?

JUROR SEAT NO. 2: No.

MR. WOLFSON: No?

JUROR SEAT NO. 2: No.

MR. WOLFSON: And as we go on another question that you answered was 57 yes. That dealt with a person killing his own child must necessarily be mentally ill or crazy. You have heard us talk about that answer. Can you conceive of a situations where a person could kill his own child without being mentally ill?

JUROR SEAT NO. 2: No, I can't.

MR. WOLFSON: Would that affect your judgment or way of deliberating in this case?

JUROR SEAT NO. 2: No. I would -- I would listen to the evidence.

MR. WOLFSON: Do you agree there is a -- you apparently in number 58 feel that if a person is mentally ill, it would follow they're insane? The question was insanity as referred to in this case is a legal term, not a medical term. Do you agree a person can be mentally ill and under the law not insane, and you answered no.

JUROR SEAT NO. 2: Well, after hearing the questions and the answers, I would change that.

MR. WOLFSON: To?

JUROR SEAT NO. 2: Yes.

MR. WOLFSON: But you feel that without hearing any evidence of the defendant's mental state, do you feel he had to be mentally ill to have committed the act he's accused of?

JUROR SEAT NO. 2: Yes.

MR. WOLFSON: Could you conceive of a situation where he is simply upset or depressed, unhappy with circumstances in his life and decides to kill himself and take his child with him?

THE COURT: I think part of the problem is the notion of what does mentally ill mean. I think perhaps are you saying, ma'am, that you believe that no one in their normal state of mind would do this?

JUROR SEAT NO. 2: That's what I'm saying, yes.

THE COURT: All right. And do you understand that whether a person is in what we believe to be their normal state of mind or not is not the test in this case. That, in other words, that you could do -- you feel without hearing any evidence that you would automatically believe that Mr. Patterson was not sane, that is that he was insane, if you simply hear that he killed his child? In other words, do you think that every person who kills their child necessarily must be insane as opposed to not in their normal frame of mind?

JUROR SEAT NO. 2: I would think so.

THE COURT: You understand the difference? You're not in your normal frame of mind. Can you conceive of a person not in their normal frame of mind who still is sane?

JUROR SEAT NO. 2: Yes, I can.

THE COURT: And do you think that a person in that with that kind of mental status could kill their own child and try to take their own life?

JUROR SEAT NO. 2: Yes, I think something could happen. Stress, great emotional strain, which wouldn't mean that he would be -- that he's not -- he was insane for the moment.

THE COURT: Do you think that he could be sane for the moment and yet not as he normally would be; in other words, one of the other jurors -- I don't remember which one it is -- said I couldn't conceive of myself ever doing something like that. I assume you couldn't conceive of yourself ever doing something like that.

JUROR SEAT NO. 2: No.

THE COURT: Are you saying that the only way you could conceive of yourself doing something like that would be if you were at least in your mind insane?

JUROR SEAT NO. 2: Yes.

THE COURT: Okay. Is it possible that you could conceive of a situation where someone else other than yourself might be legally in the eyes of the law sane and yet still take the life of their own child or another child? Or do you think that in every single case that they would necessarily be insane?

JUROR SEAT NO. 2: At that time I do, yes.

MR. WOLFSON: Pass for cause.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: No questions.

THE COURT: All right. Thank you, Mrs. Martin. You'll be excused.

THE CLERK: Thelma Gray.

THE COURT: Ms. Greg, you have heard a lot of questions also. Any comments you want to --

JUROR SEAT NO. 2: I feel these past three days have been very stressful for me. I'm beginning to doubt that I would be able to cope with being on this jury for several weeks. Now that I hear more about the case, I just feel I would have a problems.

THE COURT: You think you would have difficulty because of the nature of the crime?

JUROR SEAT NO. 2: Yes, and also -- yes.

THE COURT: All right. Mr. Wolfson.

MR. WOLFSON: I'll stipulate, Your Honor.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: I'd stipulate also.

THE COURT: All right, you're excused. Thank you.

THE CLERK: Barbara Licari.

THE COURT: I guess we'll start with the same question to you. Do you know of any reason why you couldn't be fair and impartial in this case?

JUROR SEAT NO. 2: No.

THE COURT: And do you feel that you could -- even though it's a very emotional type of case, do you feel that you could hang with us and judge this case on the facts and not by any preconceived ideas that you or anyone else might have?

JUROR SEAT NO. 2: Yes.

THE COURT: And do you feel that at this point that there is anything in your background that we should know about that might affect your ability to be fair and impartial to this case?

JUROR SEAT NO. 2: No.

THE COURT: All right, Mr. Wolfson.

MR. WOLFSON: Thank you, Your Honor. Can you hear me all right?

JUROR SEAT NO. 2: Yes.

MR. WOLFSON: Have you been able to hear the proceedings so far?

JUROR SEAT NO. 2: Uh-huh.

MR. WOLFSON: I think you have heard every one of the questions.

JUROR SEAT NO. 2: (Nods affirmatively).

MR. WOLFSON: You have been asked if your answers would be different.

JUROR SEAT NO. 2: They would be the same.

MR. WOLFSON: They would be the same. And the critical question's circumstantial evidence.

JUROR SEAT NO. 2: I understand that.

MR. WOLFSON: You have no problem with it?

JUROR SEAT NO. 2: No.

MR. WOLFSON: You can conceive of a situation where a person might kill their own child and not be mentally disturbed or mentally ill?

JUROR SEAT NO. 2: No.

MR. WOLFSON: Do you --

JUROR SEAT NO. 2: No, I could see.

MR. WOLFSON: That could happen?

JUROR SEAT NO. 2: Oh, yes. Uh-huh.

MR. WOLFSON: Thank you. I have nothing further.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Mrs. Licari, I have no questions for you either. Thank you. Pass for cause.

THE COURT: All right. Then it's the defendant's peremptory, I believe.

MR. HUMPHREYS: We'll pass for cause, or, excuse me, pass the challenge.

THE COURT: Thank you. Let's get our terminology.

MR. HUMPHREYS: Yes.

MR. WOLFSON: Excuse me for just one second. I'll thank and excuse Mr. Aylers.

THE COURT: All right, sir. Thank you.

THE CLERK: Jeffrey Brooks.

THE COURT: All right. Mr. Brooks. I guess the first question is do you know of any reason why you couldn't sit here for this trial as a fair and impartial juror?

JUROR SEAT NO. 9: No, sir.

THE COURT: And you have heard all the questions numerous times like everyone else?

JUROR SEAT NO. 9: Yes, sir.

THE COURT: Do you feel that you have any preconceived ideas about sanity or about the nature of this crime, alleged crime that would affect your ability to fairly judge the case without sympathy or prejudice for or against either side?

JUROR SEAT NO. 9: I don't believe so. No, sir.

THE COURT: All right. Mr. Wolfson.

MR. WOLFSON: Thank you, Your Honor. Mr. Brooks, can you hear all right and have you been able to?

JUROR SEAT NO. 9: Yes.

MR. WOLFSON: I'm a little concerned about your answer to question 20. Do you believe that you would not be morally or philosophically able to make a decision in this case. You answered yes.

JUROR SEAT NO. 9: Can I see the question, please?

MR. WOLFSON: Unless we mixed up the questionnaires. I hope we didn't.

JUROR SEAT NO. 9: I think the explanation of that goes with it may help. Maybe I asked incorrectly. I don't think I would have any moral problems.

MR. WOLFSON: Do you belong to any religious group or organization that does not allow you to --

JUROR SEAT NO. 9: No, sir.

MR. WOLFSON: -- pass judgment upon?

JUROR SEAT NO. 9: No, sir.

MR. WOLFSON: Or in a situation like this?

JUROR SEAT NO. 9: No.

MR. WOLFSON: I think you were also -- I didn't mean to pick you out. It's just that's the way you answered the question. That's one that always raises a concern. You had some concern at least initially regarding circumstantial evidence.

JUROR SEAT NO. 9: I think along with everyone else, yes.

MR. WOLFSON: Right. Has that concern been allayed?

JUROR SEAT NO. 9: I believe so, yeah.

MR. WOLFSON: All right. No further questions.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Thank you. Mr. Brooks, you had indicated in response to one of the questions that it's possible you might have a difficult time listening and considering graphic testimony concerning the killing of a human being. Is that your state of mind still?

JUROR SEAT NO. 9: I could do it.

MR. HUMPHREYS: Okay, I understand.

JUROR SEAT NO. 9: But I'm aware that it won't be easy. It won't be easy for me. But I could do it.

MR. HUMPHREYS: I think I discussed this with one of the other members of the panel earlier. And I said it's understandable and certainly human to have an emotional response to a graphic picture that shows graphic details concerning the death of another individual.

JUROR SEAT NO. 9: Right.

MR. HUMPHREYS: And what we need to know I guess is there are some people who can set it aside or set the emotional response aside and consider the photo as evidence. And I suppose there are other people who upon seeing a picture like that, you know, ball game is over. They just can't go on any further. Or their

impartiality is out the window. Do you think you would fall into that latter category as you sit here now?

JUROR SEAT NO. 9: No, I don't. I just think it would be difficult. That's all I expressed.

MR. HUMPHREYS: Your present state of mind though is that you feel you could put evidence like that into its proper perspective?

JUROR SEAT NO. 9: Yes, sir.

MR. HUMPHREYS: Were you able to hear me this morning when I was discussing some subject matters with other jurors who were already sitting in the box?

JUROR SEAT NO. 9: I have been here throughout the day, yes.

MR. HUMPHREYS: Understood. One juror said he couldn't hear everything, and I just wanted to make sure you have heard everything.

JUROR SEAT NO. 9: No, I have heard everything.

MR. HUMPHREYS: No, but?

JUROR SEAT NO. 9: I'm not sure I understood everything, but.

MR. HUMPHREYS: That's okay. I'm not sure I understood it either. Nonetheless, did any of the areas that I talked about with other jurors raise any concerns or red flags in your mind?

JUROR SEAT NO. 9: I don't believe so, no.

MR. HUMPHREYS: All right. Do you know any of the other jurors on this panel?

JUROR SEAT NO. 9: No, I don't believe so.

MR. HUMPHREYS: Thank you, Mr. Brooks. That's all I have.

MR. WOLFSON: My apologies. May I ask Mr. Brooks an initial question or two? I know it can generate. I missed something.

THE COURT: All right.

MR. WOLFSON: Mr. Brooks, question 66, if the expert bases his opinion in part upon what the defendant told him, will you look at the defendant's statement to see if you think the defendant was telling the doctor the truth

or not. And you put a question mark and said not necessarily.

JUROR SEAT NO. 9: I would have to take the defendant at his word whether I believe he's telling the truth or not. Maybe that's wrong. I think you always have to look at the testimony and determine it's just because someone is under oath does not necessarily mean they're telling the truth is the way I look at it.

MR. WOLFSON: What I'm saying is you would say you would take the defendant at his word?

JUROR SEAT NO. 9: Not necessarily.

MR. WOLFSON: Okay, you wouldn't.

JUROR SEAT NO. 9: No. I think as a gut feeling that you have to.

MR. WOLFSON: I mean would you agree that for whatever reason somebody may lie, either on the stand or --

JUROR SEAT NO. 9: Yes, sir.

MR. WOLFSON: Or have lied to somebody else?

JUROR SEAT NO. 9: Sure.

MR. WOLFSON: And you have to look at different instructions on how to judge credibility. Whether the person has a reason to lie, stake to lie, bias, that sort of thing.

JUROR SEAT NO. 9: I would need instructions on how to judge that credibility, yes.

MR. WOLFSON: All right, thank you.

THE COURT: All right. It's the defendant's peremptory.

MR. HUMPHREYS: Pass.

THE COURT: People's peremptory.

MR. WOLFSON: I'll thank and excuse Mr. Brooks.

THE COURT: All right, Mr. Brooks, thank you for coming.

THE CLERK: Ronald Burbank.

THE COURT: Mr. Burbank, good afternoon.

JUROR SEAT NO. 9: Yes, sir.

THE COURT: You have heard all the questions numerous times. You know what I'm going to ask you.

Do you know of any reason why you couldn't be fair and impartial at this point?

JUROR SEAT NO. 9: No, sir, I don't.

THE COURT: Know of anything in your background that we ought to know about that might affect your ability to fairly deliberate?

JUROR SEAT NO. 9: No, sir.

THE COURT: All right. Mr. Wolfson.

MR. WOLFSON: Mr. Burbank, apparently for some time you were president and Chief Executive Officer of Quality Freightways?

JUROR SEAT NO. 9: Yes, sir.

MR. WOLFSON: I don't even believe this event occurred on Highway 80. One of the witnesses and I don't even believe I have subpoenaed that witness was a Consolidated Freightways driver. Who was a witness kind of after the fact. It's been seven years since or at least since you have been retired.

JUROR SEAT NO. 9: It's been eleven years since I left Consolidated Freightways and ten years since I retired from Freightliner Corporation.

MR. WOLFSON: One time Consolidated Freightliner Corporation?

JUROR SEAT NO. 9: That's right.

MR. WOLFSON: Purchased by Volvo or something?

JUROR SEAT NO. 9: No, it was Dimerband (phon), Germany.

MR. WOLFSON: I knew it was European company. All right. As far as the questions that you were asked or that you heard, I should say, being asked, you yourself have no response that you think we should be aware of?

JUROR SEAT NO. 9: No, sir.

MR. WOLFSON: All right, thank you. Pass for cause.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Mr. Burbank, did you hear the subject areas I went over with other jury members this morning?

JUROR SEAT NO. 9: Yes, I did.

MR. HUMPHREYS: Any of the areas I talked about raise any red flags in your mind?

JUROR SEAT NO. 9: No.

MR. HUMPHREYS: As you sit here today, is there anything any reason you can think of that would make it difficult for you to be fair and impartial to both People and Mr. Patterson?

JUROR SEAT NO. 9: No, sir.

MR. HUMPHREYS: Thank you, Mr. Burbank. Pass for cause.

THE COURT: Defendant's peremptory.

MR. HUMPHREYS: Pass the challenge, Your Honor.

THE COURT: People's peremptory.

MR. WOLFSON: We'll pass also, Your Honor.

THE COURT: All right. Ladies and gentlemen, when both sides pass, that means the twelve of you are the twelve that are going to try this case. So you are it. For them, however you want to phrase it. Madam Clerk, would you swear the twelve, please.

(Jury sworn)

THE COURT: Now, for those of you who are still here, there is one last thing we have to do. And that's alternate jurors. So we have four prospective jurors left. I'm going to ask counsel do you want to have one alternate or two?

THE COURT: Given the nature of the case and the length of time.

MR. WOLFSON: It's the time of the year also, Your Honor. We agree two would be appropriate.

THE COURT: All right. Madame Bailiff, then if you would put one more chair in that spot there next to Mr. Baldwin, although it's going to be difficult to get in and out when that chair is there.

Actually, the other possibility would be to have the other alternate to sit on this floor right down here on the floor next to.

MR. WOLFSON: It's where Mr. Patterson has to go in and out.

THE COURT: We can try it down here and see. Either there or, well, let's go ahead and pick the first, Madam Clerk. The first alternate will take the one vacant chair that is there. We'll start with that.

THE CLERK: Jane Hall.

THE COURT: All right. Mrs. Hall, the alternate jurors are in a unique position because if none of the twelve are excused for any reason, you basically sit and listen to everything, but you don't get to decide on the ultimate issue before the court. However, in the event that anything were to happen to one of them, you would obviously fulfill a very important role because you would then be substituted for that absent juror. And I can tell you that I have seen the need for alternate sometimes in two day trials. Also I have seen trials last for five weeks without any change in the constitution. So the number of days is not really critical. But it is very important that you be able to participate that you have the same state of mind as the twelve jurors who are part of the panel. That is that you not have any preconceived ideas about this case and that you be able to fairly and impartially try the facts. Do you feel from what you have heard for these past couple of days that you could do that?

JUROR: Yes, I could.

THE COURT: All right. Do you know of anything in your background that either I or they should know about that might affect their assessment of your ability to try the case?

JUROR: No, I don't know of anything.

THE COURT: All right. Mr. Wolfson.

MR. WOLFSON: Good afternoon.

JUROR: Hi.

MR. WOLFSON: Have you been able to hear the questions?

JUROR: Yes.

MR. WOLFSON: You had some concern with circumstantial evidence.

JUROR: Your cookie story fixed it.

MR. WOLFSON: Thank you.

THE COURT: Actually, it's Judge Francis' cookie story, but that's okay.

JUROR: Whoever.

THE COURT: We have heard it so many times that we have all used it.

MR. WOLFSON: You also indicated that regarding the insanity issue you agreed that a person can be mentally ill and under the law not insane. But when asked if you had a problem with that aspect of the law indicated you don't well enough to know how to answer that one on its face. The answer is no. Have you heard anything more that has enlightened you?

JUROR: Oh, yes. Yes. That's why I'm so happy to be here because if I get an opportunity, I would further my education.

MR. WOLFSON: And how would you answer the question?

JUROR: I can't remember exactly how you stated it, so I don't know whether to say yes or no to the question. Would you ask it in a simple manner, please?

MR. WOLFSON: As opposed to a double negative as many of the questions were. Basically, we're simply asking if you heard the judge's explanation or reading of the instruction finding legal insanity?

JUROR: Yes.

MR. WOLFSON: And the idea that insanity is not a medical term, but legal term.

JUROR: Yes, I understand.

MR. WOLFSON: And that there is a difference between being mentally ill and legally insane?

JUROR: Yes.

MR. WOLFSON: And you agree that difference exists, but do you have a concern or problem with that concept?

JUROR: Not at all.

MR. WOLFSON: In other words, you recognize the fact that folks can be suffering different degrees of mental illness. And until those degrees, either that mental illness reaches a point or it is in the nature that fits into the legal

definition of insanity, a person is not legally insane and therefore excused from their actions.

JUROR: Right.

MR. WOLFSON: I also note that you either did or do belong to MADD.

JUROR: Oh.

MR. WOLFSON: Mother's Against Drunk Driving. Have you or anyone close to you ever participated in any group concern with crime prevention or victims' rights. MADD, et cetera. Was it MADD or was it another group?

JUROR: That was just a little, a little donation to a cause. That's all.

MR. WOLFSON: I gave money on two occasions. I see, okay. Thank you. I have no further questions.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: Mrs. Hall, would you be upset if I didn't ask you any more questions?

JUROR: Not at all.

MR. HUMPHREYS: All right. Pass for cause.

THE COURT: All right. Then let's take the second alternate juror then.

THE CLERK: Dawn Oakley.

THE COURT: I think we'll have you sit down here for now, but we may move you to the other end once we start the trial.

JUROR: That's okay, sir.

THE COURT: This courtroom is a little small, and it's hard to carry things around. We don't want to hit -- you have heard the questions that have been asked?

JUROR: Yes.

THE COURT: Do you have any comments that you would like to make at this point with respect to your qualifications that you think we ought to know about?

JUROR: With the exception of the graphic.

THE COURT: Photos.

JUROR: Yes. I feel like I might get sick.

THE COURT: Okay. Assuming you didn't, do you think that even if they're graphic that you would be -- now

one of the things I'm told by the attorneys is you're not going to get a lot of them. They're going to try to keep them to a minimum. But because of the nature of the offense, some of them are necessary to be shown to the jury so the jury can evaluate the nature of the injuries in trying to understand what a pathologist might say about how those injuries occurred. Sometimes the photographs are the only way since none of us were there to get some idea to understand what the doctor's testifying about. Sometimes the nature of the injuries also gives us a clue as to the motives, the intent, et cetera, of the perpetrator. So they're sometimes important even though they can be very grotesque. Do you feel that you would be able to even if they did turn your stomach still not say well I stop there, I don't need to see any more. He's obviously guilty or not guilty. Do you feel that, in other words, you could continue on and not make up your mind just on some gruesome pictures?

JUROR: I'm not so sure of that. I might have formed an opinion at that minute.

THE COURT: If I tell you you're not to form an opinion until the whole case is over with, do you think you could follow that?

JUROR: Yes.

THE COURT: Okay. Because I'm going to tell you that I'm going to tell every one of you that. So all right. Mr. Wolfson.

MR. WOLFSON: Can you hear me all right?

JUROR: Yes.

MR. WOLFSON: There was something you mentioned that in your questionnaire that you mentioned was private. Do you wish to talk?

JUROR: It was concern. It wasn't a question. Said do you have a family that has mentally ill or something like that.

MR. WOLFSON: Uh-huh.

JUROR: Yeah, I do not want to discuss for the whole world what was it.

MR. WOLFSON: Perhaps we should.

THE COURT: Let me ask a question then since I don't have all of the questionnaires. Without going into any details, is there a member of your family, immediate family or family members somewhere in your family that has been diagnosed as having some form of mental illness?

JUROR: Well, I do not know it was diagnosed, but she's to see a psychiatrist.

THE COURT: Okay. Is this person a person who is living at the present time?

JUROR: No.

THE COURT: How long ago was this.

JUROR: Four years ago.

THE COURT: Four?

JUROR: Uh-huh.

THE COURT: Did this person ever discuss with you what went on when she saw the psychiatrist?

JUROR: No.

THE COURT: Did you ever see any papers in which a psychiatrist wrote down what he thought was wrong with her, if anything?

JUROR: No.

THE COURT: Okay. Was there anything about that experience that you think would affect you as a juror in this case?

JUROR: No, because it's different nature of home.

THE COURT: Different nature of problem?

JUROR: Yes.

THE COURT: So it wasn't somebody with what's called manic-depressive disorder, or did you ever know what the so-called disorder was?

JUROR: No.

THE COURT: You did not. You just knew that they went to a psychiatrist; is that right?

JUROR: Yes.

THE COURT: Okay. I don't think we need to go any further on that.

MR. WOLFSON: Ms. Oakley, you also mentioned in answer to as part of question 56 asked do you agree in

this case where there may be a defense of insanity if you start out -- I better read the beginning. There is some people who read a particular crime and might read of a particular crime and might say to themselves well there's got to be something wrong with an individual who does something like that. Some people might react that way. And you say yes. Do you agree that in this case where there may be a defense of insanity, if you start out with a -- with that preconceived notion before hearing the evidence, then you will not be sitting as an impartial juror. And you had some concern about answering that.

JUROR: Well, the question was so long after I read it. I reread and I still don't know.

THE COURT: You don't know what it asked you to answer?

MR. WOLFSON: That's our fault. The question was -- another question that wasn't worded very well. Do you think though that if the insanity defense is raised as part of the defense second part of the trial that you would not be able to sit as an impartial juror?

JUROR: I don't think so.

MR. WOLFSON: You don't think you would be impartial?

JUROR: I think I can.

THE COURT: She thinks she can be. It's another one of those double negatives.

MR. WOLFSON: Yeah, we do that, don't we? I'm sorry. Then we ask later insanity as referred to in this case is a legal term, not a medical term. Do you agree that a person can be mentally ill and under the law not insane?

JUROR: Yes, I do.

MR. WOLFSON: And do you have any problem with that aspect of the law. And you said yes.

JUROR: I do.

MR. WOLFSON: Could you explain?

JUROR: I feel like pleading insanity is just a cop out, not want -- don't want to admit responsibility for action.

MR. WOLFSON: If you are instructed that it is a legal defense, and we have talked about defense applying to the sanity phase of the proceeding, that you are to presume the defendant is sane during the guilt fade but are instructed it's a legal defense, and instructeded under which conditions you may find a person insane, do you think you could follow the law?

JUROR: I think I can follow the law with difference personal hoping --

MR. WOLFSON: In other words.

JUROR: I can go, yes, under the judge rule order. I may not clearly agree with it.

MR. WOLFSON: You may not like it, but you'll follow the law?

JUROR: Yes.

MR. WOLFSON: And you'll give both the defendant and the People a fair trial on that issue too?

JUROR: Yes.

MR. WOLFSON: Okay, thank you.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: No questions.

THE COURT: All right. Then it's the People's peremptory first.

MR. WOLFSON: We have two, I believe.

THE COURT: That's correct.

MR. WOLFSON: It would be the first of the two alternate jurors. I think Ms. Hall. I'll thank and excuse her.

THE COURT: All right. Ms. Hall, you're excused. Thank you.

THE CLERK: Natasha Carter.

THE COURT: Not here.

THE CLERK: Guy Eldridge.

THE COURT: All right. It's been a long day, Mr. Eldridge.

JUROR: Yeah.

THE COURT: You have heard a lot of questions. I don't know what your questionnaire says. But anything that we ought to know about that's not in the

questionnaire at this point that you think might affect your ability to be fair and impartial?

JUROR: No.

THE COURT: Okay. And have you heard anything about this case before today?

JUROR: I remember my wife mentioning it to me when she read it in the paper. That's all.

THE COURT: Okay.

JUROR: Which I didn't remember until like today or yesterday sometime.

THE COURT: All right. Is there anything that you can recall about what you were told that would affect your ability to be fair and impartial; in other words, could you set it aside and decide the case on what happens in the courtroom?

JUROR: Yeah, I could.

THE COURT: All right, Mr. Wolfson.

MR. WOLFSON: Do you recognize the difference between mental illness and legal definition of sanity?

JUROR: Yes.

MR. WOLFSON: Do you have any concerns or problems with that?

JUROR: Not after listening to everything in here, no.

MR. WOLFSON: You didn't express any on your questionnaire either.

JUROR: I know what you're looking for.

MR. WOLFSON: You apparently had some concerns, and I'm guessing it's the wording of the questions.

JUROR: I didn't know if what my assertion would be who as far as listening to that psychiatrist testimony. Now that all this -- hear all of this, I understand, and I would take it how it was.

MR. WOLFSON: So, basically, what you're willing and able to do is listen to the basis of what the psychiatrist if there are any use to form their opinion.

JUROR: Yeah. I didn't see your question said something about my doubting them or something like that.

MR. WOLFSON: Uh-huh.

JUROR: I didn't know that. Actually do that if I wanted to. I didn't know. So that's why I had the questions on that question, those two questions.

MR. WOLFSON: Let me read it. If the expert bases his opinion in part on what the defendant told him, would you look at the defendant's statement to see if you think the defendant was telling the doctor the truth or not?

THE COURT: That needs to be clarified by the fact that you are the -- you'll be instructed that you determine the credibility of the witnesses including the out of court statements of any witnesses.

JUROR: See, I didn't know if that was going to be my job or not when I answered that.

THE COURT: Knowing that then, you can answer his question I think.

JUROR: Then I would answer it yes, I think. Yes. Yes to the other one. The way I originally answered them.

MR. WOLFSON: So, basically, you agree and recognize that it's possible -- I'm not going to say it's happening at this point yet. But it's possible that the doctor based an opinion if he has one on what he was told by the defendant, and it's possible the defendant didn't tell the truth. You will judge whether or not what the doctor was told in your opinion was truthful. If you believe it was not, you'll factor that in as to whether or not you should believe or agree with the doctor's opinion?

JUROR: Yes.

THE COURT: As well as anything else that the doctor says you relied on, I suppose.

JUROR: I understand that after being here the last two days.

MR. WOLFSON: We're getting close. As to the one circumstantial evidence.

JUROR: I don't have a problem now that it's been explained to me.

MR. WOLFSON: I don't think you had a problem before, did you?

JUROR: I don't think so. But now that's it's been explained so many times, I really don't.

MR. WOLFSON: And as to the 57, you answered that you can conceive of a situation wherein a person might kill his own child. I self-defense purposes or accidental purposes, but intentionally kill his own child and not be mentally ill or disturbed even though it sounds like an irrational act.

JUROR: Is that 57? Yeah, I answered the questions pretty much literally they could have. Not necessarily. Be someone would have to be mentally ill to do that.

MR. WOLFSON: And you might have some doubts as to why?

JUROR: What the factors were.

MR. WOLFSON: Where you would listen to the evidence?

JUROR: Yeah.

MR. WOLFSON: And follow the law?

JUROR: Yes.

MR. WOLFSON: Now we talked a little bit about motive before. Motive is not an element of the offense, but you will be instructed that motive could be considered a lack of evidence. But there are situations where motive sounded bizarre and Irrational. Out and out crazy. If that being the situation what appears to have been the motive, would you be willing to factor that in?

JUROR: Yes.

MR. WOLFSON: I'll pass for cause. Thank you.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: No questions.

THE COURT: The defendant's peremptory.

MR. HUMPHREYS: We'll thank and excuse Mrs. Oakley.

THE COURT: Mrs. Oakley, thank you for coming.

THE COURT: That only leaves one person. Mr. Hayward, you might as well come up and take a seat.

THE CLERK: Daniel Hayward.

THE COURT: You have heard all everything before since you're the last one. Any comments that you would like to make concerning your qualifications to serve in this case?

JUROR: No, I imagine there will be some questions asked.

THE COURT: You have some prior experience in law enforcements, as I recall.

JUROR: Yes, I have.

THE COURT: And how long ago was that?

JUROR: About eight years.

THE COURT: And when did you last serve in law enforcement?

JUROR: 1985.

THE COURT: 1985, all right. Anything about that service that you think would affect your ability to serve in this case?

JUROR: No.

THE COURT: Any preconceived notions? You have heard some prospective jurors say they have already pretty well made their minds up. Just from what they have heard, they can decide the case. Do you feel that way at all about any of the issues?

JUROR: No, I don't.

MR. WOLFSON: Where are you employed now?

JUROR: For the City of Nevada City.

MR. WOLFSON: But not in law enforcement?

JUROR: No.

MR. WOLFSON: And what do you do for the city now?

THE WITNESS: I take care of city's buildings and grounds.

MR. WOLFSON: And you have been doing that for eight years?

JUROR: Yeah.

MR. WOLFSON: You chose to leave law enforcement?

JUROR: Yes, I did.

MR. WOLFSON: And can you be fair and impartial to both sides?

JUROR: I think so, yes.

MR. WOLFSON: Give the defendant the benefit of your judgment?

JUROR: Yes.

MR. WOLFSON: Give the People the benefit of your judgment?

JUROR: Yes.

MR. WOLFSON: Thank you.

THE COURT: Mr. Humphreys.

MR. HUMPHREYS: No questions.

THE COURT: All right. It's People's peremptory.

MR. WOLFSON: I'll accept the alternates.

THE COURT: All right. It's the defendant's peremptory.

MR. HUMPHREYS: No challenge here, Your Honor.

THE COURT: You're passing as well?

MR. HUMPHREYS: I am passing.

THE COURT: Well, then we made it with nobody to spare. Madam Clerk, would you please swear the two alternates. Mr. Eldridge and Mr. Hayward, if you would raise your right hand. You don't have to stand up.

THE COURT: All right. And you are it. It's now 4:30. However, now that you are the official jury, I'm going to give you a slightly different admonition. That is like an instruction, but it's not a legal instruction that has anything to do with how you're going to decide the facts. It has to do with how to conduct yourselves when you're not in the courtroom in your assigned seats.

Keep in mind that this case may be covered by the news media. As I understand it, in fact I was told that it has been covered by at least the Reno Gazette in Reno, Nevada. I don't know if anything has appeared in the Grass Valley Union yet because I haven't seen today's paper. But, in any event, you're admonished that you're not to discuss this case with anyone or to form or express any opinion about any of the issues in this case until it's

finally submitted to you for a decision. That means you don't talk to spouses about it. You don't talk to friends about it. If people come up and say what are you doing, you can obviously say I'm a trial juror. And if they say oh, if it was such and such a case and blah blah, you just tell them sorry, I cannot talk about it until the case is over with. We don't want any influences from the outside to affect your decisions.

During the breaks -- and we will have breaks in the morning and in the afternoon and a lunch break and after court and before court -- you can sit with each other before the bailiff calls you into the courtroom. But don't even discuss the case then. In fact, if you're talking too much, you're going to get people in the hallway that are going to come in and tell me where jurors so and so were out there talking about the case. And you can see them out there talking, but we don't know if you're talking about the case or not. So it's very important just other than maybe saying hello, how are you, you know, just did you sleep well or whatever. Don't talk a whole lot about in each other's presence even. Because it creates an appearance same way as me. I can't talk to you much during the trial. The attorneys can't talk to you during the trial because we don't want to create the appearance. Even though I'm sure that nothing improper would happen, we don't want to have an appearance to people that anything improper is happening. It's very important that we insulate each of you from any claim that there's been any undue influence upon you that you're -- in other words, we want your judgment, and we want the world to believe your judgment is your own unbiased decision about the facts, however that result may turn out.

So I'm going to give you this admonition a few times. I won't give it to you every time because I'm sure you will memorize it before too long. That I just stated. That is don't form or express any opinion about the case or discuss it among yourselves until it's finally submitted to you and you're actually deliberating the case.

Another thing is don't read anything and don't let anyone else tell you what they think about the case. Just tell them I can't discuss it. I can't listen to it. I can't read about it. I can't watch it on t.v. I don't know if we're going to get any requests by the news media to photograph. Sometimes in murder cases in rural counties the Sacramento and the Reno press think it's fun to come up here and take some camera footage to show in their evening news. They have enough murders in Reno and Sacramento these days. I haven't seen them much up here. But every now and then they will come up here for some reason, and they will shoot one of our trials. And as you know from a lot of the coverage you have seen, it's difficult to watch coverage on t.v. and not be influenced by what they claim the facts are.

So we don't -- the defendant has the right to have your unbiased opinion and so do the People. So we want to keep you as insulated from any of these outside sources as possible. So if someone does want to talk about it, just tell them I'll be happy to talk to you after the case is over if you feel that you'd want to do that. It's entirely your decision. Even after the case is over, it's up to you if you want to talk about it. If you don't want to talk about it, even then you don't have to talk about it. It's your choice.

The other thing I'll tell you now is the ordinary way in which we're going to operate is we're going to start on Wednesday the first of December, as I told you. The way the trial will proceed is the first thing you will receive is what's called the opening statements of the attorneys. Mr. Wolfson will have the opportunity, excuse me, to give you an overview of what he expects the evidence to prove. You're going to be receiving testimony from probably 25 to 35 witnesses or more. So there is going to be quite a bit of time probably needed to give you kind of an overview of how this fits together. Mr. Humphreys will have the right to give you an opening statement at that time; or, as the law provides, he can reserve his until after the People are done presenting their opening statement.

When the opening statement is done, we will then have the presentation of evidence, unless the attorneys ask me to give you some of the introductory instructions that deal with the things like credibility of witnesses and circumstantial evidence and that kind of thing. I normally do not give all of the jury instructions at the beginning, but sometimes I will give instructions on how to weigh credibility of witnesses, so you have some idea of what you're doing in that respect.

At the conclusion of the testimony in the case in what's called the guilt phase, there will then be oral arguments by the attorneys where they will try to sum up and explain to you exactly what they think the evidence is proved.

I will also give you a set of instructions at that time that include all of the instructions other than what are called the concluding instructions, which obviously means I conclude the trial with them after all the arguments are over.

Then you will be asked to go out and deliberate on the issue of guilt or innocence. If you return a verdict in that particular case on that particular phase, that will determine where we go from there. And if we have a sanity phase, it is a little different as you heard. Because in the sanity phase the defendant has the burden of proof; and, therefore, he goes first rather than the People. And he presents his evidence. And then they present their evidence after he presents his evidence.

It's also possible that there will be what's called rebuttal testimony. That means that if the People feel that there is something in the defendant's case that they will want to rebut -- if he presents a psychiatrist that states something and they feel that they have a psychiatrist that has a different opinion that you should hear about, then bring that psychiatrist in or whatever witness it might be in rebuttal.

So that's pretty much how the trial is organized. We generally start at nine o'clock in the morning. We generally break at somewhere around ten o'clock to 10:30

for about 15 minutes. We go till noon. We take a break for an hour-and-a-half. We then do the same thing in the afternoon and generally end at 4:30 because I am a family law judge, as I have told you, this year. I may be doing some family law matters that I cannot assign to other judges in which case there may be some deviation from this schedule.

The other thing that comes up sometimes -- two other things. Number one is the bailiff will give each one of you a notepad and a pencil, and you can take notes if you wish. Bear in mind that the most important thing is that you hear all of the evidence. If you can write and listen at the same time, it's no problem as far as I'm concerned that you take notes. On the other hand, if writing down notes might cause you to not hear everything, then I would suggest you not do so. There generally in most trials are enough people who do take notes that if an issue comes up later on during deliberations, someone can say well I wrote it down and I think we can go back and look at it.

What was the other thing now that I was going to say? I'll probably think of it. It's getting late in the evening. Oh, I know. Oftentimes issues will come up that where the counsel asks the judge to present testimony or legal arguments outside the presence of the jury. It is not intended to hide things from the jury. It's just that under our system of law I'm the one that has to decide what evidence is legally admissible in this trial. All you're entitled to listen to under the law is the legally admissible evidence. So occasionally you may be asked to step out in the hallway while we argue a legal point concerning evidence. So don't get too alarmed if that happens. I try to keep things going smoothly. Oftentimes the jury selection process is the most confusing and the most disconnected part of the trial because we're here one minute, we're gone, and then we're kind of -- we had different panels of people and so forth. So it takes awhile to get through. It's also very repetitive as you noticed and can be boring for those of you who have been through it,

sat and not been questioned now since yesterday. However, I think from here on things are going to move along a lot more quickly. And I think that, as I said, you're going to hear from enough different witnesses that there is going to be quite a bit of variety. If for any reason you don't hear something, raise your hand and let us know. If for any reason you have to take a break for some particular reason -- personal and you don't want to announce the reason -- raise your hand and let us know. But we'll try to take enough breaks so that everyone can relax, stretch, get a cup of coffee or whatever. From now -- yes?

JUROR NO. 10: I'm sorry to interrupt you, but I'm afraid you might get away from me. I need those dates that you were saying like December the first.

THE COURT: Okay. The trial dates right now are December 1st, 2nd, 3rd, 8th, 9th, 10th, 15th, 16th and 17th. I told you that if it takes longer than that, most likely we won't start again until after the Christmas break. What I'm going to do, however, before I determine another time is to see where everyone's schedules are in those -- in that period of time. In other words, if everybody on the jury hasn't planned anything for Wednesday, December the 22nd, fine, we'll proceed. If everyone -- if any one of you has plans, we won't. And we will therefore -- and I'm guessing that at least one of you will. So probably what's going to happen is if we don't finish by the 17th, we're going to start the first or second week in January. But what we're going to do at the minimum is conclude the guilt phase of the trial by the 17th. I'm not going to start in the middle of the sanity phase and then have a two-and-a-half week break. So if it looks like we can't finish the entire trial, we'll just have the guilt phase now and then we'll set a date in January for everyone to come back and finish the trial.

JUROR NO. 10: All right. Thank you, Your Honor. Also I have another question.

THE COURT: Yeah?

JUROR NO. 10: Is equal to this gentleman that asked. I never did get hear an answer. What if it snows? Are we expected --

THE COURT: Sometimes what happens is we send out the sheriffs, and they find each one of you and bring you to the courthouse if necessary.

JUROR NO. 10: Just as long as I don't have to drive in.

MR. WOLFSON: Did you say "fine" or "find"?

THE COURT: With a "d," yes. They will come and get you if there is a problem. Yes?

JUROR NO. 5: The notebooks we'll have use of, is that part of the court record or is that our personal?

THE COURT: They become -- you don't get to take them home. But what happens is they're left on your chairs every morning. You fill them out, you leave them on your chairs in the evening. The bailiff comes and puts each one of them in an individual envelope. No one reads them except for you. When the trial is over you can destroy them if you wish, or you can -- what happens with them otherwise? I think --

THE BAILIFF: I just destroy them.

THE COURT: She just destroys them. They're not your property to take home, but they are not read by anyone other than. And you do not become part of the record of the case.

JUROR NO. 10: Okay. Your Honor, you mentioned about them coming to get you about taking you home.

THE COURT: I think they will probably do that too.

JUROR NO. 10: I just want to make sure. I mean, you know.

THE COURT: We have had problems before.

JUROR NO. 10: We have had terrible storms where it's jeopardizes everybody lives.

THE COURT: I had one where they came and got me before. No, we're not going to sequester the jury. Yes, Mr. Eldridge?

ALTERNATE JUROR: Us alternates, we're here through the whole time of the deliberations and everything?

THE COURT: What usually happens is when they send the jury out to deliberate, the two of you give us a phone number where you can be reached; and you're allowed to go on your own as long as you remember the admonition not to discuss it until it's over. Because it may still be going on. You might even be asked to start deliberations in the middle. You probably read about some of these famous cases in the not too distant past like the Debbie case and some others where a juror became sick during the deliberations and they had to literally bring an alternate in and start the deliberations over and use that alternate. So you'll be notified when your services are not needed. You're to assume they are until you hear otherwise. But you are allowed to not -- you don't have to sit around here and wait for the others to deliberate if you're not in the room with them.

ALTERNATE JUROR: I was wondering if we had to go in a room and just sit there and not have anything to say about it.

THE COURT: No. You don't sit there and just passively listen. You'll be an active participant if you ever end up in that room.

JUROR NO. 10: In the courtroom?

THE COURT: Deliberation.

JUROR NO. 10: I mean in the jury room even though they're an alternate?

THE COURT: They're not involved unless one of you becomes unable to participate.

JUROR NO. 10: But do they go in with you?

THE COURT: No, no. In fact, they go home until they're needed.

JUROR NO. 10: I see.

THE COURT: Now, if one of you gets sick during like next Wednesday or a week from Wednesday, one of you can't be here, one of them will be actually serving on the case for the duration. All right. Yes?

JUROR NO. 3: Is there anything that we can take to our work to let them know that we are officially jurors?

THE COURT: The jury commissioner on up on the third floor can give you the information. I don't know about today, but certainly you could come in -- court's in session on Mondays and Tuesdays. Come in on next Monday and you can get that information from her on the third floor. Her name is Kathleen Pinaglia. You can get that any time any day usually Monday through Friday. Okay. Then have a good weekend. In fact have a good week. We'll see you on the first at 9:00 a.m.

(Whereupon, the matter was adjourned)

December 2, 1993, Nevada City, California

--oOo--

(The following is an excerpt from proceedings held this day)

THE COURT: Court will call the case of People versus Patterson, number 49140. The defendant is present with counsel.

Ladies and gentlemen, you probably understand that you were subpoenaed by the jury commissioner for a Municipal Court trial downstairs. And all of a sudden you find yourselves up in the Superior Court. There's been a slight change of plans. One of the things I need to talk to you about in this particular case is that this case is a murder case. Because it's a case involving an allegation of murder, it's going to take considerably longer than the ordinary Municipal Court trial might take. I don't know if you have any preconceived ideas about how long your service might be requested. I'm sure most of you have not had an opportunity to ask employers about the effects of your being involved in jury service for longer than a day or two.

What this case is is a case in which the defendant is accused in an Information which is a charge, in other words, of the crime of murder. The alleged victim is his daughter. And he has entered pleas of not guilty to the charges, and not guilty by reason of insanity. Which means that there could be two trials in this case, not one. And it's expected by the attorneys to take at least until the 17th of December. Now for those of you who have Christmas plans we're not going to be in session in this case for the last two weeks of the year. If necessary, if the case cannot be finished by the 17th of December, it's going to be finished in the month of January of next year.

The court is in session three days a week -- Wednesdays, Thursdays and Fridays. So we will be in session today and tomorrow. And the 10th, 11th and 12th

-- strike that. The 8th, 9th and 10th and then the 15th, 16th and 17th.

It's anticipated that what's called the guilt phase of this trial will be certainly finished by then and possibly both phases. We don't know at this point. And I'm not going to predict that it will be over by then. But what I will guarantee is that court will not be in session from December the 17th at least through the 31st of December of this year. We may not even be in session the first week of January. We may have to go to the second week of January to finish the trial.

(Conclusion of requested portion)

STATE OF CALIFORNIA)
)
COUNTY OF NEVADA)

I, Penny V. Gordon, a Certified Shorthand Reporter of the State of California, do hereby certify:

That I was present at the hearing held in the matter of People versus PATTERSON, and correctly took down in machine shorthand all of the testimony, and the proceedings had in the foregoing matter.

That I thereafter caused my said shorthand notes to be reduced to transcript form, and that the foregoing transcript constitutes a full, true and correct record of such testimony given and proceedings had.

I further certify that I have complied with CCP 237(a)(2) in that all personal juror identifying information has been redacted if applicable.

Certified to at Nevada City, California, on the 20th day of September, 2000.

PENNY V. GORDON, CSR NO. 6994
Official Court Reporter

APPENDIX K

99-15530

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MITCHELL ALFRED PATTERSON,
Petitioner-Appellant,

v.

JAMES H. GOMEZ,
Respondent-Appellee.

On Appeal from the United States District Court
for the Eastern District of California
No. CV-S-96-01546 DFL

REQUEST FOR RECORD CITATION

BILL LOCKYER
Attorney General

DAVID P. DRULINER
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99-15530

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MITCHELL ALFRED PATTERSON,

Petitioner-Appellant,

v.

JAMES H. GOMEZ,

Respondent-Appellee.

TO: THE HONORABLE JOSEPH T. SNEED, HARRY PREGERSON, AND WILLIAM A. FLETCHER, CIRCUIT JUDGES, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Counsel for Appellee Gomez hereby respectfully requests that this Court provide counsel for Appellee Gomez the record citation for the following quotation which is set forth at page 10070 of the August 16, 2000, slip opinion in this case. Under Headnote [8] this Court stated that:

> At the beginning of the trial the judge instructed the jury as follows:
> At the conclusion of the testimony in the case in what's called the guilt phase, there will then be oral arguments by the attorneys where they will try to sum up and explain to you exactly what they think the evidence is proved. I will also give you a set of instructions at that time that include all of the instructions other than what are called the concluding instructions, which

> obviously means I conclude the trial with them after all the arguments are over. Then you will be asked to go out and deliberate on the issue of guilt or innocence. If you return a verdict in that particular case on that particular phase, that will determine where we go from there. And if we have a sanity phase, it is a little different as you heard. Because in the sanity phase the defendant has the burden of proof; and, therefore, he goes first rather than the People. And he presents his evidence. And then they present their evidence after he presents his evidence.
>
> A short time later, the judge reiterated that the guilt phase would come first and the sanity phase second.

On or about December 17, 1999, counsel for Appellee received a request from this Court (via a telephone call from Stephen Seferian of the Clerk's Office) for a transcript of the preliminary instruction concerning the bifurcated nature of the trial. As I explained on that date, counsel for Appellee could not provide the transcript because it was not in our possession. Although page 142 of the Clerk's Transcript revealed that on November 19, 1993, the trial court "instruct[ed] the jury as to the nature and procedure of the trial," the index of the Reporter's Transcript on Appeal did not include a transcript for that date or for any other date in November. Volume One of the Reporter's Transcript in Appellee's possession includes a transcript for October 22, 1993, which is then followed by the transcript for December 2, 1993, which begins at page 23 with the opening statement of the prosecutor.

Counsel for Appellee has contacted both the prosecutor and counsel for appellant Patterson to inquire whether either of them had in their possession the transcript in question. The prosecutor informed me that

his file does not contain a transcript for any proceedings that took place during the period between October 22, 1993, and the December 2, 1993, opening statement. Patterson's counsel, Mr. Bonneau, informed me that he could not remember having seen a reporter's transcript pertaining to the trial court's November 19, 1993, instruction to the jury concerning the nature and procedure of the trial and that he would be unable to inspect his files for two weeks as he is currently in trial.

For the above reasons, counsel for Appellee Gomez respectfully requests that this Court provide counsel for both parties the citation for the volume number, page(s) and date of the Reporter's Transcript in which the above quoted instructions are found.

Dated: August 25, 2000.

Respectfully submitted,

BILL LOCKYER
Attorney General

DAVID P. DRULINER
Chief Assistant Attorney General

ROBERT R. ANDERSON
Senior Assistant Attorney General

CARLOS A. MARTINEZ
Supervising Deputy Attorney General

STAN CROSS
Supervising Deputy Attorney General

Attorneys for Respondent-Appellee

DECLARATION OF SERVICE BY MAIL

Re: PATTERSON v. Gomez **No. 99-15530**

I, the undersigned, declare that I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business. On August 25, 2000, I placed the attached

REQUEST FOR RECORD CITATION

in the internal mail collection system at the Office of the Attorney General, 1300 I Street, Suite 125, Sacramento, California, 95814, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope (or envelopes), postage fully postpaid, addressed as follows:

Charles M. Bonneau (2 copies)
Attorney at Law
980 Ninth Street, Suite 1400
Sacramento, CA 95814
Representing Appellant Mitchell Alfred Patterson

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on August 25, 2000, at Sacramento, California.

_____
DECLARANT

APPENDIX L

Office of the Clerk
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 Seventh Street
San Francisco, California 94103

Cathy A. Catterson
Clerk of Court

(415) 556-9800

September 7, 2000

Stan Cross, AAG
Supervising Deputy Attorney General
1300 I Street, Suite 125
Sacramento, CA 94244-2550

Charles M. Bonneau, Esq.
980 Ninth Street, Suite 1400
Sacramento, CA 95814

Re: Patterson v. Gomez, No. 99-15530

Dear Counsel:

The Court has asked me to respond to your "request for record citation" in the above-referenced case. The Court ordered additional portions of the transcript at its own expense. A copy is enclosed per your request.

Very truly yours,

Cathy A. Catterson
Court Executive/Clerk of Court

Enclosure

cc: Judges Sneed, Pregerson, W. Fletcher (w/o enclosure)

IN THE UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff/Respondent, vs. MITCHELL ALFRED PATTERSON, Defendant/Appellant.	)	No.

REPORTER'S TRANSCRIPT ON APPEAL
AUGMENTATION

From the Superior Court of the County of Nevada

BEFORE: Honorable JOHN H. DARLINGTON,
Judge of the Superior Court

November 19, 1993

--o0o--

Penny V. Gordon, CSR No. 6994

ORIGINAL

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF NEVADA

--o0o--

The People of the State of California Plaintiffs, vs. MITCHELL ALFRED PATTERSON, Defendant.	)	No. 49140

TRIAL
JURY INSTRUCTIONS
(Partial Transcript)

November 19, 1993
Nevada City, California

BEFORE: Honorable JOHN H. DARLINGTON,
Judge of the Superior Court

APPEARANCES:

For the People: RONALD WOLFSON
Assistant District Attorney
Nevada County Courthouse
Nevada City, California

For the Defendant: DAVID HUMPHREYS
Deputy Public Defender
Nevada County Courthouse
Nevada City, California

--o0o--

Penny V. Gordon, CSR No. 6994

November 19, 1993, Nevada City, California

--o0o--

THE COURT: All right. And you are it. It's now 4:30. However, now that you are the official jury, I'm going to give you a slightly different admonition. That is like an instruction, but it's not a legal instruction that has anything to do with how you're going to decide the facts. It has to do with how to conduct yourselves when you're not in the courtroom in your assigned seats.

Keep in mind that this case may be covered by the news media. As I understand it, in fact I was told that it has been covered by at least the Reno Gazette in Reno, Nevada. I don't know if anything has appeared in the Grass Valley Union yet because I haven't seen today's paper. But, in any event, you're admonished that you're not to discuss this case with anyone or to form or express any opinion about any of the issues in this case until it's finally submitted to you for a decision. That means you don't talk to spouses about it. You don't talk to friends about it. If people come up and say what are you doing, you can obviously say I'm a trial juror. And if they say oh, if it was such and such a case and blah blah, you just tell them sorry, I cannot talk about it until the case is over with. We don't want any influences from the outside to affect your decisions.

During the breaks -- and we will have breaks in the morning and in the afternoon and a lunchbreak and after court and before court -- you can sit with each other before the bailiff calls you into the courtroom. But don't even discuss the case then. In fact, if you're talking too much, you're going to get people in the hallway that are going to come in and tell me where jurors so and so were out there talking about the case. And you can see them out there talking, but we don't know if you're talking about the case or not. So it's very important just other than maybe saying hello, how are you, you know, just did you sleep well or whatever. Don't talk a whole lot about

in each other's presence even. Because it creates an appearance same way as me. I can't talk to you much during the trial. The attorneys can't talk to you during the trial because we don't want to create the appearance. Even though I'm sure that nothing improper would happen, we don't want to have an appearance to people that anything improper is happening. It's very important that we insulate each of you from any claim that there's been any undue influence upon you that you're -- in other words, we want your judgment, and we want the world to believe your judgment is your own unbiased decision about the facts, however that result may turn out.

So I'm going to give you this admonition a few times. I won't give it to you every time because I'm sure you will memorize it before too long. That I just stated. That is don't form or express any opinion about the case or discuss it among yourselves until it's finally submitted to you and you're actually deliberating the case.

Another thing is don't read anything and don't let anyone else tell you what they think about the case. Just tell them I can't discuss it. I can't listen to it. I can't read about it. I can't watch it on t.v. I don't know if we're going to get any requests by the news media to photograph. Sometimes in murder cases in rural counties the Sacramento and the Reno press think it's fun to come up here and take some camera footage to show in their evening news. They have enough murders in Reno and Sacramento these days. I haven't seen them much up here. But every now and then they will come up here for some reason, and they will shoot one of our trials. And as you know from a lot of the coverage you have seen, it's difficult to watch coverage on t.v. and not be influenced by what they claim the facts are.

So we don't -- the defendant has the right to have your unbiased opinion and so do the People. So we want to keep you as insulated from any of these outside sources as possible. So if someone does want to talk about it, just tell them I'll be happy to talk to you after the case is over if you feel that you'd want to do that. It's entirely

your decision. Even after the case is over, it's up to you if you want to talk about it. If you don't want to talk about it, even then you don't have to talk about it. It's your choice.

The other thing I'll tell you now is the ordinary way in which we're going to operate is we're going to start on Wednesday the first of December, as I told you. The way the trial will proceed is the first thing you will receive is what's called the opening statements of the attorneys. Mr. Wolfson will have the opportunity, excuse me, to give you an overview of what he expects the evidence to prove. You're going to be receiving testimony from probably 25 to 35 witnesses or more. So there is going to be quite a bit of time probably needed to give you kind of an overview of how this fits together. Mr. Humphreys will have the right to give you an opening statement at that time; or, as the law provides, he can reserve his until after the People are done presenting their opening statement.

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The other thing that comes up sometimes -- two other things. Number one is the bailiff will give each one of you a notepad and a pencil, and you can take notes if you wish. Bear in mind that the most important thing is that you hear all of the evidence. If you can write and listen at the same time, it's no problem as far as I'm concerned that you take notes. On the other hand, if writing down notes might cause you to not hear everything, then I would suggest you not do so. There generally in most trials are enough people who do take notes that if an issue comes up later on during deliberations, someone can say well I wrote it down and I think we can go back and look at it.

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JUROR NO. 10: I'm sorry to interrupt you, but I'm afraid you might get away from me. I need those dates that you were saying like December the first.

THE COURT: Okay. The trial dates right now are December 1st, 2nd, 3rd, 8th, 9th, 10th, 15th, 16th and 17th. I told you that if it takes longer than that, most likely we won't start again until after the Christmas break. What I'm going to do, however, before I determine another time

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JUROR NO. 5: The notebooks we'll have use of, is that part of the court record or is that our personal?

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THE BAILIFF: I just destroy them.

THE COURT: She just destroys them. They're not your property to take home, but they are not read by anyone other than. And you do not become part of the record of the case.

JUROR NO. 10: Okay. Your Honor, you mentioned about them coming to get you about taking you home.

THE COURT: I think they will probably do that too.

JUROR NO. 10: I just want to make sure. I mean, you know.

THE COURT: We have had problems before.

JUROR NO. 10: We have had terrible storms where it's jeopardizes everybody lives.

THE COURT: I had one where they came and got me before. No, we're not going to sequester the jury. Yes, Mr. Eldridge?

ALTERNATE JUROR: Us alternates, we're here through the whole time of the deliberations and everything?

THE COURT: What usually happens is when they send the jury out to deliberate, the two of you give us a phone number where you can be reached; and you're allowed to go on your own as long as you remember the admonition not to discuss it until it's over. Because it may still be going on. You might even be asked to start deliberations in the middle. You probably read about some of these famous cases in the not too distant past like the Debbie case and some others where a juror became sick during the deliberations and they had to literally bring an alternate in and start the deliberations over and use that alternate. So you'll be notified when your services are not needed. You're to assume they are until you hear otherwise. But you are allowed to not -- you don't have to sit around here and wait for the others to deliberate if you're not in the room with them.

ALTERNATE JUROR: I was wondering if we had to go in a room and just sit there and not have anything to say about it.

THE COURT: No. You don't sit there and just passively listen. You'll be an active participant if you ever end up in that room.

JUROR NO. 10: In the courtroom?

THE COURT: Deliberation.

JUROR NO. 10: I mean in the jury room even though they're an alternate?

THE COURT: They're not involved unless one of you becomes unable to participate.

JUROR NO. 10: But do they go in with you?

THE COURT: No, no. In fact, they go home until they're needed.

JUROR NO. 10: I see.

THE COURT: Now, if one of you gets sick during like next Wednesday or a week from Wednesday, one of you can't be here, one of them will be actually serving on the case for the duration. All right. Yes?

JUROR NO. 3: Is there anything that we can take to our work to let them know that we are officially jurors?

THE COURT: The jury commissioner on up on the third floor can give you the information. I don't know about today, but certainly you could come in - court's in session on Mondays and Tuesdays. Come in on next Monday and you can get that information from her on the third floor. Her name is Kathleen Pinaglia. You can get that any time any day usually Monday through Friday. Okay. Then have a good weekend. In fact have a good week. We'll see you on the first at 9:00 a.m.

(Whereupon, the trial was adjourned)

IN THE UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff/Respondent, vs. MITCHELL ALFRED PATTERSON, Defendant/Appellant.	)	Nevada Co. No. 49140

REPORTER'S CERTIFICATE.

I, Penny V. Gordon, a Certified Shorthand Reporter of the State of California, do hereby certify:

That I was present and correctly took down in machine shorthand all of the testimony given and proceedings had in the foregoing matter.

That I thereafter caused my said shorthand notes to be reduced to transcript form, and that the foregoing transcript consisting of pages 2 through 11 constitute a full, true and correct record of such testimony given and proceedings had.

I further certify that I have complied with CCP 237(a)(2) in that all personal juror identifying information has been redacted if applicable.

Certified to at Nevada City, California, under penalty of perjury, on this 22nd day of December, 1999.

PENNY V. GORDON, CSR NO. 6994
Official Court Reporter

APPENDIX M

September 12, 2000

STAN CROSS
Supervising Deputy Attorney General
Department of Justice
Office of the Attorney General
1300 "I" Street, Suite 1101
P.O. Box 944255
Sacramento, CA 94244-2550

RE: Patterson transcripts

Dear Mr. Cross:

Enclosed please find a copy of my partial transcript of November 19, 1993, sent to the Ninth Circuit Court of Appeal on or about December 22, 1999, along with the corresponding invoice that accompanied it.

Sincerely,

Penny V. Gordon, CSR
Official Court Reporter

220 Church Street, Nevada City, CA 95959
(530) 470-1207

PENNY V. GORDON, Official Court Reporter
COUNTY OF NEVADA
220 Church Street, Nevada City, CA 95959
(530) 470-1207

BILLING STATEMENT

Date: December 22, 1999

Invoice No.: 99-078
Purchase Order No.: 00-AC-0450

UNITED STATES NINTH CIRCUIT
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San Francisco, CA 94119-3939

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TOTAL: 38.25
AMOUNT RECEIVED: -0-

PD: 1-26-00 **AMOUNT DUE: $38.25**

Please make check payable to: **PENNY V. GORDON**

IN THE UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff/Respondent, vs. MITCHELL ALFRED PATTERSON, Defendant/Appellant.	)	No.

REPORTER'S TRANSCRIPT ON APPEAL
AUGMENTATION

From the Superior Court of the County of Nevada

BEFORE: Honorable JOHN H. DARLINGTON,
Judge of the Superior Court

November 19, 1993

--o0o--

Penny V. Gordon, CSR No. 6994

COPY

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF NEVADA

--o0o--

The People of the State of California Plaintiffs, vs. MITCHELL ALFRED PATTERSON, Defendant.	)	No. 49140

TRIAL
JURY INSTRUCTIONS
(Partial Transcript)

November 19, 1993
Nevada City, California

BEFORE: Honorable JOHN H. DARLINGTON,
Judge of the Superior Court

APPEARANCES:

For the People: RONALD WOLFSON
Assistant District Attorney
Nevada County Courthouse
Nevada City, California

For the Defendant: DAVID HUMPHREYS
Deputy Public Defender
Nevada County Courthouse
Nevada City, California

--o0o--

Penny V. Gordon, CSR No. 6994

November 19, 1993, Nevada City, California

--o0o--

THE COURT: All right. And you are it. It's now 4:30. However, now that you are the official jury, I'm going to give you a slightly different admonition. That is like an instruction, but it's not a legal instruction that has anything to do with how you're going to decide the facts. It has to do with how to conduct yourselves when you're not in the courtroom in your assigned seats.

Keep in mind that this case may be covered by the news media. As I understand it, in fact I was told that it has been covered by at least the Reno Gazette in Reno, Nevada. I don't know if anything has appeared in the Grass Valley Union yet because I haven't seen today's paper. But, in any event, you're admonished that you're not to discuss this case with anyone or to form or express any opinion about any of the issues in this case until it's finally submitted to you for a decision. That means you don't talk to spouses about it. You don't talk to friends about it. If people come up and say what are you doing, you can obviously say I'm a trial juror. And if they say oh, if it was such and such a case and blah blah, you just tell them sorry, I cannot talk about it until the case is over with. We don't want any influences from the outside to affect your decisions.

During the breaks -- and we will have breaks in the morning and in the afternoon and a lunchbreak and after court and before court -- you can sit with each other before the bailiff calls you into the courtroom. But don't even discuss the case then. In fact, if you're talking too much, you're going to get people in the hallway that are going to come in and tell me where jurors so and so were out there talking about the case. And you can see them out there talking, but we don't know if you're talking about the case or not. So it's very important just other than maybe saying hello, how are you, you know, just did you sleep well or whatever. Don't talk a whole lot about

in each other's presence even. Because it creates an appearance same way as me. I can't talk to you much during the trial. The attorneys can't talk to you during the trial because we don't want to create the appearance. Even though I'm sure that nothing improper would happen, we don't want to have an appearance to people that anything improper is happening. It's very important that we insulate each of you from any claim that there's been any undue influence upon you that you're -- in other words, we want your judgment, and we want the world to believe your judgment is your own unbiased decision about the facts, however that result may turn out.

So I'm going to give you this admonition a few times. I won't give it to you every time because I'm sure you will memorize it before too long. That I just stated. That is don't form or express any opinion about the case or discuss it among yourselves until it's finally submitted to you and you're actually deliberating the case.

Another thing is don't read anything and don't let anyone else tell you what they think about the case. Just tell them I can't discuss it. I can't listen to it. I can't read about it. I can't watch it on t.v. I don't know if we're going to get any requests by the news media to photograph. Sometimes in murder cases in rural counties the Sacramento and the Reno press think it's fun to come up here and take some camera footage to show in their evening news. They have enough murders in Reno and Sacramento these days. I haven't seen them much up here. But every now and then they will come up here for some reason, and they will shoot one of our trials. And as you know from a lot of the coverage you have seen, it's difficult to watch coverage on t.v. and not be influenced by what they claim the facts are.

So we don't -- the defendant has the right to have your unbiased opinion and so do the People. So we want to keep you as insulated from any of these outside sources as possible. So if someone does want to talk about it, just tell them I'll be happy to talk to you after the case is over if you feel that you'd want to do that. It's entirely

your decision. Even after the case is over, it's up to you if you want to talk about it. If you don't want to talk about it, even then you don't have to talk about it. It's your choice.

The other thing I'll tell you now is the ordinary way in which we're going to operate is we're going to start on Wednesday the first of December, as I told you. The way the trial will proceed is the first thing you will receive is what's called the opening statements of the attorneys. Mr. Wolfson will have the opportunity, excuse me, to give you an overview of what he expects the evidence to prove. You're going to be receiving testimony from probably 25 to 35 witnesses or more. So there is going to be quite a bit of time probably needed to give you kind of an overview of how this fits together. Mr. Humphreys will have the right to give you an opening statement at that time; or, as the law provides, he can reserve his until after the People are done presenting their opening statement.

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(Whereupon, the trial was adjourned)

IN THE UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff/Respondent, vs. MITCHELL ALFRED PATTERSON, Defendant/Appellant.	)	Nevada Co. No. 49140

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I further certify that I have complied with CCP 237(a)(2) in that all personal juror identifying information has been redacted if applicable.

Certified to at Nevada City, California, under penalty of perjury, on this 22nd day of December, 1999.

PENNY V. GORDON, CSR NO. 6994
Official Court Reporter

APPENDIX N

Ladies and gentlemen of the jury, you have heard all of the evidence and the arguments of the attorneys. Now it is my duty to instruct you on the law that applies to this case. The law requires that I read the instructions to you. You will have these instructions in written form in the jury room to refer to during your deliberations. You must base your decision on the facts and the law.

(RT 1657.)

. . . Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider all instructions as a whole and each in light of all the others.

(RT 1658.)

The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crime charged, murder, unless the proved circumstances are not only, one, consistent with the theory that the defendant had the required specific intent or mental state, but, two, cannot be reconciled with any other rational conclusion.

Also, if the evidence as to any such specific intent or mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, you must adopt the interpretation which points to the absence of the specific intent or mental state. If, on the other hand, you find one interpretation of the evidence as to such specific intent or mental state to be

reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(RT 1661.)

A defendant in a criminal action is presumed to be innocent until the contrary is proved. In the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the people the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows. It is not a mere possible doubt because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire consideration and comparison of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

In the crime charged in the Information, namely murder, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless such specific intent exits, the crime to which it relates is not committed. The specific intent required is included in the definition of the crime charged.

In the crime charged in the Information, namely murder, there must also exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless such mental state exists, the crime to which it relates is not committed. The necessary mental states for murder of the first and second

degree are included in the definition of those crimes.

Evidence has been received regarding a mental disease or mental disorder of the defendant at the time of the crime in the information. You may consider such evidence solely for the purpose of determining whether or not the defendant actually formed the mental state *or specific intent* which is an element of the crime charged in the information, and are found in the definitions of murder.

If from all of the evidence you determine to be credible you have a reasonable doubt whether the defendant formed any required mental state or had the necessary specific intent, you must find that he did not have such mental state or specific intent.

At the time of the alleged offense charged in the information, you are instructed to presume the defendant was sane.

RT 1668-1670; AEOR 33-34, italics added.[2]

Now we're going to give you the description of the homicides that are involved. Homicide is the killing of one human being by another either lawfully or unlawfully. Homicide includes murder and manslaughter which are unlawful, and the acts of excusable or justifiable homicides which are lawful. The defendant is accused in

---

2. The italicized portion of the above instructions was included in the written jury instructions given to the jury but was omitted when the judge read the instructions to the jury. It also should be noted that, when the judge read the written version of the challenged instruction to the jury, he substituted the word "were" for the word "are" in the last phrase: "you are instructed to presume the defendant sane."

the Information of having committed a crime of murder, a violation of Penal Code Section 187.

Every person who unlawfully kills a human being with malice aforethought is guilty of the crime of murder in violation of Section 187 of the Penal Code. In order to prove such crime, each of the following elements must be proved: number one, a human being was killed; number two, the killing was unlawful; and, three, the killing was done with malice aforethought.

A killing is unlawful if it was neither justifiable or excusable. Malice, the term I just used, may be either expressed or implied. Malice is expressed when there is manifested an intention unlawfully to kill a human being. Malice is implied when, one, the killing resulted from an intentional act; two, the natural consequences of the act are dangerous to human life; and, three, the act was deliberately performed with knowledge of the danger and with conscious disregard for human life.

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed. The word aforethought does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

All murder which is perpetrated by any kind of willful deliberated and premeditated killing with express malice aforethought is murder of the first degree. The word "willful" as used in this instruction means intentional. The word "deliberate" means formed or arrived at or determined upon as a result of careful thought

and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand. If you find that the killing was preceded and accompanied by a clear deliberate intent on the part of the defendant to kill which was the result of deliberation and premeditation so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree. The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold calculated judgment and decision may be arrived at in a short period of time. But a mere unconsidered and rash impulse even though it included an intent to kill is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree. To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice; and, having in mind the consequences, he decides to and does kill.

Murder of the second degree is the unlawful killing of a human being with malice aforethought when there is manifested an intention unlawfully to kill a human being; in other words, express malice, but the evidence is insufficient to establish deliberation and premeditation.

Murder of the second degree is also the unlawful killing of a human being with implied

malice which requires, one, the killing resulted from an intentional act; two, the natural consequences of the act are dangerous to human life; and, three, the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life. When the killing is the direct result of such an act, it is not necessary to establish that the defendant intended that his act would result in the death of a human being.

The crime of involuntary manslaughter is the unlawful killing of a human being without malice aforethought. If you find that the defendant as a result of a mental disease or mental disorder killed another human being without the intent to kill and without malice aforethought, the crime is involuntary manslaughter. In the lesser included offense of involuntary manslaughter there must exist a union or joint operation of act or conduct and general criminal intent. To constitute general criminal intent, it is not necessary there should exist an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent even though he may not know his act or conduct is unlawful.

Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty; but also, if you should find him guilty of an unlawful killing, you must agree unanimously as to whether he is guilty of murder of the first degree, murder of the second degree or involuntary manslaughter. Murder as I have told you is classified into two degrees. If you should find the defendant guilty of murder, you must determine and state in your verdict whether you

find the murder to be of the first or second degree.

If you are convinced beyond a reasonable doubt that the crime of murder has been committed by the defendant but you have a reasonable doubt as [t]o whether such murder was of the first or of the second degree, you must give defendant the benefit of the doubt and return a verdict fixing the murder as of the second degree. If you are satisfied beyond a reasonable doubt that the killing was unlawful but you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt and find it to be involuntary manslaughter rather than murder.

RT 1670-1674.

ORIGINAL

No. 00-692

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

JAMES H. GOMEZ, Director
Petitioner,

v.

MITCHELL ALFRED PATTERSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

RESPONDENT'S BRIEF OPPOSING CERTIORARI

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No. 00-692

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

JAMES H. GOMEZ, Director
Petitioner,

v.

MITCHELL ALFRED PATTERSON,
Respondent.

Respondent MITCHELL ALFRED PATTERSON respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 223 F.3d 959 (9th Cir. 2000).

The factual and procedural history is set forth in the Circuit Court opinion. Additional facts will be referenced as necessary to Respondent's argument.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Petitioner proposes a change in constitutional protections which would allow the presumption of key facts which the prosecution is otherwise required to prove.

The constitutional error which is to be avoided here is the withdrawal or prejudgment of an issue, by an instruction that the law raises a presumption of intent from the commission of a particular act. *Morissette v. United States,* 342 U.S. 246, 274 (1952); *Sandstrom v. Montana,* 442 U.S. 510, 522 (1979). The Circuit Court of Appeals here held that the instruction on presumption of sanity amounted to an instruction that the defendant was a person of sound mind, and that this instruction shifted the burden of proof at the guilt phase of the trial, when the defendant's mental state was very much in issue.

Petitioner relies on language from the opinion of the district court. There it was asserted that "there was no instruction link-up… between [Respondent's] sanity and the mens rea issues." Findings and Recommendations of Magistrate Judge, Appendix E to Petition for Writ of Certiorari, p. 10. As Petitioner would have it, in order to find constitutional error there must be an explicit instruction connecting the presumption and the mental element of the offense.

To the contrary, the more powerful and therefore more dangerous burden-shifting instruction may be directed to a portion of the evidence itself. As stated by this Court in *Francis v. Franklin,* 471 U.S. 307, 313 (1985),

> The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. [358], at 364 [1970]. This "bedrock, 'axiomatic and elementary' [constitutional] principle," *id.*, at 363, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. [Citations.]
>
> (Emphasis added.)

It is not hard to demonstrate that a presumption affecting the weight and consideration of evidence may be at least as powerful as a presumption which goes directly to an element of the offense. Consider the following instructional language which was at the focus of the opinion in *Francis v. Franklin, supra.*

> ... The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted....
>
> 471 U.S. at 311; emphasis added.

Would it not have been even worse if the jury in *Francis v. Franklin* had been told to presume that the defendant was "a person of sound mind and discretion"? That is what the *Patterson* jury was told, through the presumption of sanity instruction. The *Patterson* instruction went to the heart of the issues between the parties. "If the jury is required to presume the nonexistence of the very mental disease, defect, or disorder that prevented the defendant from forming the required mental state for first degree murder, that presumption impermissibly shifts the burden of proof for a crucial element of the case from the state to the defendant." *Patterson v. Gomez, supra,* 223 F.3d at 965.

The departure from current law proposed by Petitioner is unnecessary and unwarranted. Just as circumstantial evidence may be just as persuasive as direct evidence, so a presumption concerning a factual issue may be just as devastating to the outcome of a trial as an instruction to presume an element of the offense. A change in the rule of *Francis v. Franklin*, as proposed by Petitioner, would needlessly debilitate the constitutional principles which insure that the State bears the burden of proof.

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2. The record augmentation issue does not meet the Rule 10 standard for review by this Court.

Petitioner does not argue that the record augmentation in this case, to include the state trial court's pre-trial admonition to the jury, was improper or unauthorized. Impliedly, Petitioner concedes that the federal appellate court may augment the record on its own motion.

Rather, Petitioner complains of lack of notice. No citation is offered to any fundamental right which was violated by lack of notice in these circumstances. Rather, complete record augmentation should be encouraged to promoted accuracy and uniformity in appellate opinions.

No petition for rehearing was filed in this case. F.R.A.P. Rule 40. Petitioner's complaint on this minor matter should have been directed to the Circuit Court.

In any event, no prejudice can be established. The purpose of the augmentation was to aid Petitioner, to clear up any possibility that the state trial court may have given preliminary jury instructions which explained the term "sanity" as it was later used in the burden-shifting instruction.

Petitioner goes on to provide additional transcripts of the jury voir dire, which are claimed to shed some light on the point. Appendix J. But the time to offer those transcripts was when the issues were joined in the lower courts, state and federal.

Jury voir dire is not jury instruction. No cited decision, and no decision known to Respondent's counsel, permits the correction of constitutional error in jury instructions by reference to jury voir dire.

For all of the above reasons, this argument does not merit review by this Court.

3. There is no conflict between this Court's opinions in *Cupp* and *Francis*, as shown by the Circuit Court's practice of reviewing the jury instruction in context with all instructions which were read, and with the entire trial record.

Here Petitioner attempts an entirely unique and unprecedented gamut in the guise of a supposed conflict between the opinions in *Francis v. Franklin, supra,* and *Cupp v. Naughten,* 414 U.S. 141 (1973). Chief Justice Rehnquist has cautioned, both in the *Cupp* opinion and again in the dissent to the *Francis v. Franklin* opinion, that the record of the entire trial be examined to determine whether the erroneous instruction infected the entire trial.

The Circuit Court scrupulously adhered to this admonition. Not only did it augment the record for any possibility of a corrective pre-trial instruction, but it relied upon the powerful argument of the prosecutor which built upon the erroneous instruction.

> Mr. Patterson is presumed to be sane. And that[,] in this stage of the proceeding[,] is the law.... [W]hen Mr. Patterson called the psychiatrists[,] he called at the guilt phase and in a sense has put the cart before the horse. Mr. Patterson has attempted to show that because of his mental condition, he didn't form an intent, the intent required or [sic] premeditate or deliberate.... The basis of opinions - and you're going to be instructed to basically disregard any opinion that goes to the ultimate fact. You heard - *the instruction says any opinion from a psychiatrist that goes to intent, premeditation or the ultimate fact[,] disregard. That's the law. At this stage of the proceeding you are to do that. You are to presume he's sane. You are not to accept that opinion.*
>
> ....
>
> Those are the elements. Unlawful killing of a human being with malice aforethought and for first degree murder willful, deliberate, premeditated. We talked about motive not being an element. But the motive was provided for us simply by Mr. Patterson. *He's presumed to be sane in this stage of the proceeding. He was sane.*
>
> 223 F.3d 967-968; emphasis in Circuit Court opinion.

This is precisely the sort of analysis called for in *Cupp* and in *Francis v. Franklin*. There is no tension between those decisions which can be generated from the Circuit Court opinion in this case.

Petitioner proposes to explore the transcript of the jury voir dire to demonstrate that somehow the jury was made aware of the different meanings of the term "sanity," and the different phases of the trial in which the definitions were to apply. But jury voir dire is not the time to instruct the prospective jury members on the law. The purpose of voir dire is to deter-

mine whether jurors can be fair. Cal. Code of Civil Procedure § 223. The discussion may range over many subjects without pretending to instruct on the law.[1]

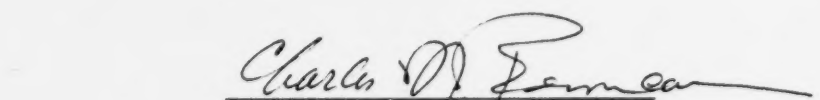
At page 27 of the Petition, Petitioner proposes that the transcript of voir dire be reviewed to evaluate the effect of burden-shifting error in jury instructions. Such review would be unprecedented. It does not assist Petitioner's argument in this case because the error was never alluded to or corrected.

CONCLUSION

For all of the above reasons, this Petition does not qualify the Circuit Court opinion for review on certiorari. Respondent was unjustly convicted. The Petition should be denied.

Date: November 16, 2000

Respectfully submitted,



CHARLES M. BONNEAU
Attorney for Respondent

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[1] See page 146 of the transcript, Appendix J, where the state trial court tried to answer a juror's question about the legal standard for insanity. The court could not find the definition. The transcript does not demonstrate that the legal standard was made clear at any point before the guilt verdict was rendered.

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No. 00-692

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

C.A. TERHUNE, Director
Petitioner,

v.

MITCHELL ALFRED PATTERSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

No. 00-692

C.A. TERHUNE, Director
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v.

MITCHELL ALFRED PATTERSON,
Respondent.

ARGUMENT

I.

THE CHALLENGED INSTRUCTION IN THE PRESENT CASE DID NOT SHIFT THE BURDEN OF PROOF AT THE GUILT PHASE OF THE TRIAL

At page four of his Brief in Opposition, Respondent parrots the faulty reasoning of the Ninth Circuit's *Patterson* opinion by arguing that the jury was effectively "told to presume that the defendant was 'a person of sound mind and discretion'" when the trial court gave the jury the instruction that the defendant was presumed to be sane at the guilt phase of the trial. (Brief in Opposition at 4.) Although Respondent correctly sets forth the holding of the Ninth Circuit ("that the instruction on presumption of sanity amounted to an instruction that the defendant was a person of sound mind, and that this instruction shifted the burden of proof at the guilt phase of the trial" (Brief in Opposition at 2)), the reasoning of the Ninth Circuit's *Patterson* opinion is fatally flawed.

As previously discussed in the Petition for Writ of Certiorari, the Ninth Circuit ignored the undisputed findings by the state appellate court that the trial court correctly had advised the jurors prior to the guilt phase "that the case would be tried in two parts, a guilt phase and a sanity phase," and that "trial counsel did not take issue with the challenged instruction." Despite the presumption of correctness under federal law which should be accorded to the state court findings; despite appellate counsel's concession that the trial court correctly advised the jury about the bifurcated nature of the trial; despite the fact that appellate counsel has never claimed ineffective assistance of trial counsel due to trial counsel's

failure to object; despite the fact that the jury never requested reinstruction concerning either the challenged instruction or the instruction on the use of evidence of mental disease or mental disorder to determine Respondent's specific intent; and despite the fact that the very quotation obtained without notice to the parties indicates that the jurors previously had been given additional information concerning the bifurcated proceedings, the Ninth Circuit proceeded to concoct a speculative rationale based upon the theory that the jury could have been confused by the challenged instruction's failure to define sanity and therefore might have relied upon a lay definition of insanity which could have shifted the burden of proof to Respondent. However, Appendix J conclusively establishes the jury's true understanding of the bifurcated proceedings and undermines the Ninth Circuit's speculative argument that the jury might have relied upon an everyday definition of the word sane.

In an effort to support their argument that the challenged instruction shifted the burden of proof, Respondent and the Ninth Circuit have chosen to ignore the extensive and detailed language spoken to the jury which fully supports the state court's findings of fact and which eviscerates the Ninth Circuit's speculative rationale for reversal. (Appendix J at 5-6, 11-13, 15-19, 21-22, 33, 39, 41-43, 47, 50-52, 56-59, 61-62, 64, 72-74, 78-79, 82, 88-89, 92-94, 97-101, 105-106, 112, 117, 119, 131-132, 145-146, 149, 156, 159-162, 168, 170-171, 174-176, 183.) In short, the transcript of the voir dire proceedings conclusively demonstrates: 1) that the jurors were warned that "sane" was being used in something other than the conventional lay sense (Appendix J at 11-13, 15-16, 19, 21-22, 33, 42-43, 47, 72-73, 78-79, 82, 88, 92-94, 97-101, 105-106, 112, 119, 131-132, 145-146, 149, 156, 159-162, 170-171, 174-176); 2) that it was explained to the jurors that the presumption of sanity was the analytical basis for the bifurcated trial (Appendix J at 5-6, 11, 16-18, 39, 41-42, 51, 58-59, 79, 89,

175, 183); and 3) that the judge provided the jurors with the *M'Naghten* definition of insanity that the jury was asked to presume (Appendix J at 50-52, 57, 64, 72-73, 88, 93-94, 97-98, 105-106, 119, 149).

II.

THE PARTIES AGREE THAT COMPLETE RECORD AUGMENTATION SHOULD BE ENCOURAGED TO PROMOTE ACCURACY AND UNIFORMITY IN APPELLATE OPINIONS

At page five of his Brief in Opposition, Respondent argues that "complete record augmentation should be encouraged to promote[] accuracy and uniformity in appellate opinions." Petitioner agrees.[1] Unfortunately, the Ninth Circuit failed to seek "complete record augmentation" in the present case. As detailed in the Petition for Writ of Certiorari, the Ninth Circuit augmented the appellate record in the present case with a partial transcript which was then used to circumvent the state court findings of fact and support the Ninth Circuit's rationale for reversal despite language in the partial transcript which indicated that further augmentation would undermine the rationale for reversal.

Respondent also argues that "[n]o petition for rehearing was filed in this case" and that "Petitioner's complaint on this minor matter should have been directed to the Circuit Court." (Brief in Opposition at 5.) Petitioner most certainly would have petitioned for rehearing on the augmentation issue (the second question presented in the Petition for Writ of Certiorari) if the

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1. Petitioner further agrees with Respondent's statement that "Chief Justice Rehnquist has cautioned, both in the *Cupp* opinion and again in the dissent to the *Francis v. Franklin* opinion, that the record of the **entire trial** be examined to determine whether the erroneous instruction infected the entire trial." (Brief in Opposition at 6, emphasis added.) However, Petitioner submits that Respondent is mistaken when he claims that the Ninth Circuit "scrupulously adhered to this admonition." (*Id.*)

Ninth Circuit had not effectively precluded Petitioner from doing so by failing to give the parties notice of the December 22, 1999, selective augmentation and by failing to respond to Petitioner's timely oral and written requests for a record citation until after the time for a petition for rehearing had expired.[2]

Respondent further argues that Petitioner should have offered the transcripts of the jury voir dire (Appendix J) "when the issues were joined in the lower courts, state and federal." (Brief in Opposition at 5.) Respondent is mistaken. First, it should be noted that counsel for Respondent Patterson cited *Francis v. Franklin* for the first time during the course of oral argument in the state appellate court and that the state appellate court proceeded to question counsel for Respondent Patterson about whether the trial court had correctly advised the jurors about the procedure of the trial. In its November 6, 1995, opinion, the state appellate court subsequently found (based upon counsel's concession at oral argument) that "It is undisputed that the trial court correctly advised the jurors (1) that the case would be tried in two parts, a guilt phase and a sanity phase, and (2) that defendant was presumed sane in the guilt phase." The court also noted that "trial counsel did not take issue with the challenged instruction."[3] (Appendix G at 10.) Second, it was

---

2. With regard to the other two questions presented in the Petition for Writ of Certiorari, it should be noted that the first question would not properly have been raised in a petition for rehearing under the Ninth Circuit guidelines, which provide that petitions for rehearing "which merely reargue the case should not be filed." As to the third question presented in the Petition for Writ of Certiorari, only this Court can resolve the conflict between the majority opinions in *Cupp v. Naughten*, 414 U.S. 141 (1973) and *Francis v. Franklin*, 471 U.S. 307 (1985).

3. In a footnote to its November 6, 1995, opinion, the state appellate court stated:

Respondent's burden as a federal habeas corpus petitioner to challenge the aforementioned state appellate court findings of fact which were entitled to a presumption of correctness under federal law. 28 U.S.C. § 2254(e)(1); *see also Sumner v. Mata*, 449 U.S. 539 (1981) [presumption of correctness equally applicable to state appellate court findings of fact]; *Burks v. Borg*, 27 F.3d 1424, 1427-1428 (9th Cir. 1994) [factual findings entitled to the presumption may be made at any point in the process]. Undoubtedly because he knew that the jurors had been correctly informed in the course of voir dire about the bifurcated nature of the trial, Respondent's appellate counsel never sought to augment the state appellate record or the federal habeas record to include transcripts of the voir dire proceedings.

At page six of his Brief in Opposition, Respondent argues that "[n]o cited decision, and no decision known to Respondent's counsel, permits the correction of constitutional error in jury instructions by reference to jury voir dire." However, Respondent's argument misses the point. Petitioner's position is that there was no constitutional error in the jury instructions in the present case. As discussed in the Petition for Writ of Certiorari, the Ninth Circuit erred by extending *Francis* to the present case where the jury was properly instructed on mens rea issues and where there was no instructional link

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> At oral argument, defendant cited *Francis v. Franklin* (1985) 471 U.S. 307 [85 L.Ed.2d 344], which concerned jury instructions that effectively relieved the State of its burden of proof on criminal intent. As explained above, the trial court expressly instructed the jury it could consider evidence of defendant's mental disability in determining whether he formed "the mental state or specific intent" necessary for murder. We find *Francis* inapposite.

(Appendix G at 9, fn. 2.)

between the instructions concerning specific intent for first degree murder and the alleged *Sandstrom* error. Petitioner submits that once the *Patterson* court decided to augment the appellate record in order to invalidate the state court findings, it should have been obligated in the interest of fairness and justice to consider the preliminary instructions and questioning during voir dire before determining whether the "reasonable juror" referred to in *Sandstrom v. Montana*, 442 U.S. 510 (1979) would have considered the charge to have created an unconstitutional presumption.

Finally, at page eight of his Brief in Opposition, Respondent argues that a review of the jury voir dire transcript (Appendix J) "does not assist Petitioner's argument in this case" because "[t]he transcript does not demonstrate that the legal standard [for insanity] was made clear at any point before the guilt verdict was rendered." (Brief in Opposition at 8, fn. 1.) Respondent is mistaken. To the contrary, the trial court explicitly instructed the jury as follows with the *M'Naghten* definition of insanity that the jury was asked to presume:

> A person is legally insane when by reason of mental disease or mental defect he was incapable of knowing or understanding the nature and quality of his act or incapable of distinguishing right from wrong at the time of the commission of the crime. You may consider evidence of his mental condition before, during or after the time of the commission of the crime as tending to show the defendant's mental condition at the time the crime was committed.
>
> Mental illness and mental abnormality in whatever form either may appear are not necessarily the same as legal insanity. A person may be mentally ill or mentally abnormal and yet

> not be legally insane. The defendant has the burden of proving his legal insanity at the time of the commission of the crime by a preponderance of the evidence. That's essentially the instruction.

(Appendix J at 51; also see Appendix J at 50-52, 57, 64, 72-73, 88, 93-94, 97-98, 105-106, 119, 149 where the distinction between mental illness and legal insanity is further elaborated and prospective jurors acknowledge that they understand the difference between being mentally ill and legally insane and that they can follow the law as it applies to the legal definition of insanity, the *M'Naghten* rule.)

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Dated: November 28, 2000.

Respectfully submitted,

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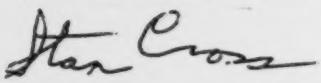

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